

The Whistleblower Protection Act: Auditors



Auditing Standards: Ethics

Because auditing is essential to government accountability to the public, the public expects audit organizations and auditors who perform their work in accordance with Government Auditing Standards to follow ethical principles.

GAGAS 3.02

Auditing Standards: Ethics


Performing audit work in accordance with ethical principles is a matter of personal and organizational responsibility. Ethical principles apply in preserving auditor independence.

Integrity and objectivity are maintained when auditors perform their work and make decisions that are consistent with the broader interest of those relying on the audit report, including the public.



Auditing Standards: Ethics

The ethical principles that guide the work of auditors who conduct engagements in accordance with Government Auditing Standards are

- a. the public interest;
 - b. integrity;
 - c. objectivity;
 - d. proper use of government information, resources, and positions; and
 - e. professional behavior.
- 

Auditing Standards: Ethics

Public Interest

The public interest is defined as the collective well-being of the community of people and entities that the auditors serve. Observing integrity, objectivity, and independence in discharging their professional responsibilities helps auditors serve the public interest and honor the public trust.

GAGAS 3.07



Auditing Standards: Ethics

Integrity

Public confidence in government is maintained and strengthened by auditors performing their professional responsibilities with integrity. Integrity includes auditors performing their work with an attitude that is objective, fact-based, nonpartisan, and nonideological with regard to audited entities and users of the audit reports.

Auditing Standards: Ethics

Integrity

Making decisions consistent with the public interest of the program or activity under audit is an important part of the principle of integrity. In discharging their professional responsibilities, auditors may encounter conflicting pressures from management of the audited entity, various levels of government, and other likely users.

In resolving those conflicts and pressures, acting with integrity means that auditors place priority on their responsibilities to the public interest.

Auditing Standards: Ethics

Objectivity

Auditors' objectivity in discharging their professional responsibilities is the basis for the credibility of auditing in the government sector.

Objectivity includes independence of mind and appearance when conducting engagements, maintaining an attitude of impartiality, having intellectual honesty, and being free of conflicts of interest.

Maintaining objectivity includes a continuing assessment of relationships with audited entities and other stakeholders in the context of the auditors' responsibility to the public.

GAGAS 3.11

Auditing Standards: Ethics

Proper Use of Government Information, Resources and Positions

Transparency and confidentiality are Key!

Government information, resources, and positions are to be used for official purposes and not inappropriately for the auditors' personal gain or in a manner contrary to law or detrimental to the legitimate interests of the audited entity or the audit organization. This concept includes the proper handling of sensitive or classified information or resources.

Misusing the auditor position for financial gain or other benefits violates an auditor's fundamental responsibilities.

GAGAS 3.12

Auditing Standards: Ethics

Professional Behavior

High expectations for the auditing profession include complying with all relevant legal, regulatory, and professional obligations and avoiding any conduct that could bring discredit to auditors' work, including actions that would cause an objective third party with knowledge of the relevant information to conclude that the auditors' work was professionally deficient.

Professional behavior includes auditors putting forth an honest effort in performing their duties in accordance with the relevant technical and professional standards.

GAGAS 3.16


Auditing Standards: Professional Judgment

Auditors must use professional judgment in planning and conducting the engagement and in reporting the results.

Professional judgment includes exercising reasonable care and professional skepticism. Reasonable care includes acting diligently in accordance with applicable professional standards and ethical principles.

Attributes of professional skepticism include a questioning mind, awareness of conditions that may indicate possible misstatement owing to error or fraud, and a critical assessment of evidence.

Professional skepticism includes being alert to, for example, evidence that contradicts other evidence obtained or information that brings into question the reliability of documents or responses to inquiries to be used as evidence. Further, it includes a mindset in which auditors assume that management is neither dishonest nor of unquestioned honesty.



Auditing Standards: Professional Judgment

Auditors may accept records and documents as genuine unless they have reason to believe the contrary.

Auditors may consider documenting procedures undertaken to support their application of professional skepticism in highly judgmental or subjective areas under audit.

Using the auditor's professional knowledge, skills, and abilities, in good faith and with integrity, to diligently gather information and objectively evaluate the sufficiency and appropriateness of evidence is a critical component of the audit.

***Documentation of independence considerations provides evidence of the auditor's judgments in forming conclusions regarding compliance with independence requirements.

Auditing Standards: Competence

Always ensure that you have the requisite knowledge, skills, and abilities needed when conducting an audit in accordance with Government Auditing Standards and the understanding necessary to proficiently apply

- a. standards, statutory requirements, regulations, criteria, and guidance applicable to auditing or the objectives for the engagement(s) being conducted; and
- b. techniques, tools, and guidance related to professional expertise applicable to the work being performed.

Auditor proficiency in these areas helps ensure that the audits are conducted properly.

Auditing Standards: Previous Audits

When planning the audit, auditors should ask management of the audited entity to identify previous audits, attestation engagements, and other studies that directly relate to the objectives of the audit, including whether related recommendations have been implemented.

Auditors should evaluate whether the audited entity has taken appropriate corrective action to address findings and recommendations from previous engagements that could have a significant effect on the subject matter.

Auditors should use this information in assessing risk and determining the nature, timing, and extent of current audit work and determining the extent to which testing the implementation of the corrective actions is applicable to the current audit objectives.

Auditing Standards: Findings

When auditors identify findings, they should plan and perform procedures to develop the criteria, condition, cause, and effect of the findings to the extent that these elements are relevant and necessary to achieve the audit objectives.

Auditors should consider internal control deficiencies in their evaluation of identified findings when developing the cause element of the identified findings.

GAGAS 6.18

Auditing Standards: Findings

Findings may involve deficiencies in internal control; noncompliance with provisions of laws, regulations, contracts, and grant agreements; or instances of fraud.

Given the concept of accountability for use of public resources and government authority, evaluating internal control in a government environment may also include considering internal control deficiencies that result in waste or abuse.

Because the determination of waste and abuse is subjective, auditors are not required to perform specific procedures to detect waste or abuse in financial audits.

However, auditors may consider whether and how to communicate such matters if they become aware of them. Auditors may also discover that waste or abuse are indicative of fraud or noncompliance with provisions of laws, regulations, contracts, and grant agreements.

Auditing Standards: Findings

Waste is the act of using or expending resources carelessly, extravagantly, or to no purpose. Importantly, waste can include activities that do not include abuse and does not necessarily involve a violation of law. Rather, waste relates primarily to mismanagement, inappropriate actions, and inadequate oversight.

The following are examples of waste, depending on the facts and circumstances:

- a. Making travel choices that are contrary to existing travel policies or are unnecessarily extravagant or expensive.
- b. Making procurement or vendor selections that are contrary to existing policies or are unnecessarily extravagant or expensive.

GAGAS 6.21-22




Auditing Standards: Findings

ABUSE

Abuse is behavior that is deficient or improper when compared with behavior that a prudent person would consider reasonable and necessary business practice given the facts and circumstances, but excludes fraud and noncompliance with provisions of laws, regulations, contracts, and grant agreements. Abuse also includes misuse of authority or position for personal financial interests or those of an immediate or close family member or business associate.

Auditing Standards: Findings

The following are examples of abuse, depending on the facts and circumstances:

- a. Creating unneeded overtime.
 - b. Requesting staff to perform personal errands or work tasks for a supervisor or manager.
 - c. Misusing the official's position for personal gain (including actions that could be perceived by an objective third party with knowledge of the relevant information as improperly benefiting an official's personal financial interests or those of an immediate or close family member; a general partner; an organization for which the official serves as an officer, director, trustee, or employee; or an organization with which the official is negotiating concerning future employment).
- 

Auditing Standards: Findings (Criteria)

Criteria: For inclusion in findings, criteria may include the laws, regulations, contracts, grant agreements, standards, measures, expected performance, defined business practices, and benchmarks against which performance is compared or evaluated. Criteria identify the required or desired state or expectation with respect to the program or operation.

Auditing Standards: Findings (Condition)

Condition: Condition is a situation that exists. The condition is determined and documented during the audit.

Auditing Standards: Findings (Cause)

Cause: The cause is the factor or factors responsible for the difference between the condition and the criteria, and may also serve as a basis for recommendations for corrective actions. Common factors include poorly designed policies, procedures, or criteria; inconsistent, incomplete, or incorrect implementation; or factors beyond the control of program management. Auditors may assess whether the evidence provides a reasonable and convincing argument for why the stated cause is the key factor contributing to the difference between the condition and the criteria.

Auditing Standards: Findings (Effect)

Effect or potential effect: The effect or potential effect is the outcome or consequence resulting from the difference between the condition and the criteria. When the audit objectives include identifying the actual or potential consequences of a condition that varies (either positively or negatively) from the criteria identified in the audit, effect is a measure of those consequences. . Effect or potential effect may be used to demonstrate the need for corrective action in response to identified problems or relevant risks.

Auditing Standards: Presenting Findings

When presenting findings in the auditing report, auditors should develop the elements of the findings to the extent necessary to assist management or oversight officials of the audited entity in understanding the need for corrective action.

Auditors should place their findings in perspective by describing the nature and extent of the issues being reported and the extent of the work performed that resulted in the finding.

To give the reader a basis for judging the prevalence and consequences of these findings, auditors should, as appropriate, relate the instances identified to the population or the number of cases examined and quantify the results in terms of dollar value or other measures. If the results cannot be projected, auditors should limit their conclusions appropriately.

GAGAS 6.51




Auditing Standards: Confidential or Sensitive Information

Reporting Confidential or Sensitive Information 6.63 If certain information is prohibited from public disclosure or is excluded from a report because of its confidential or sensitive nature, auditors should disclose in the report that certain information has been omitted and the circumstances that make the omission necessary.

6.64 When circumstances call for omission of certain information from the report, auditors should evaluate whether this omission could distort the audit results or conceal improper or illegal practices and revise the report language as necessary to avoid report users drawing inappropriate conclusions from the information presented.

6.65 When the audit organization is subject to public records laws, auditors should determine whether public records laws could affect the availability of classified or limited use reports and determine whether other means of communicating with management and those charged with governance would be more appropriate. Auditors use professional judgment to determine the appropriate means to communicate the omitted information to management and those charged with governance considering, among other things, whether public records laws could affect the availability of classified or limited use reports.



Auditing Standards: Confidential or Sensitive Information

If the report refers to the omitted information, the reference may be general and not specific. If the omitted information is not necessary to meet the audit objectives, the report need not refer to its omission.

Certain information may be classified or may otherwise be prohibited from general disclosure by federal, state, or local laws or regulations. In such circumstances, auditors may issue a separate, classified, or limited use report containing such information and distribute the report only to persons authorized by law or regulation to receive it.

Auditing Standards: Confidential or Sensitive Information

Additional circumstances associated with public safety, privacy, or security concerns could also justify the exclusion of certain information from a publicly available or widely distributed report. For example, detailed information related to computer security for a particular program may be excluded from publicly available reports because of the potential damage that misuse of this information could cause.

In such circumstances, auditors may issue a limited use report containing such information and distribute the report only to those parties responsible for acting on the auditors' recommendations.

Auditing Standards: Overall Assessment

Overall Assessment of Evidence Auditors should perform and document an overall assessment of the collective evidence used to support findings and conclusions, including the results of any specific assessments performed to conclude on the validity and reliability of specific evidence.

When assessing the overall sufficiency and appropriateness of evidence, auditors should evaluate the expected significance of evidence to the audit objectives, findings, and conclusions; available corroborating evidence; and the level of audit risk. If auditors conclude that evidence is not sufficient or appropriate, they should not use such evidence as support for findings and conclusions.

When the auditors identify limitations or uncertainties in evidence that is significant to the audit findings and conclusions, they should perform additional procedures, as appropriate.

GAGAS 8.108

Auditing Standards: Reporting Compliance

When auditors comply with all applicable Government Auditing Standard (GAS) requirements, they should use the following language, which represents an unmodified GAS compliance statement, in the audit report to indicate that they conducted the audit in accordance with GAS:

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

9.04 Audit organizations that meet the independence requirements for internal audit organizations, but not those for external audit organizations, should include in the GAS compliance statement, where applicable, a statement that they are independent per the GAS requirements for internal auditors.

9.05 When auditors do not comply with all applicable GAS requirements, they should include a modified GAS compliance statement in the audit report. For performance audits, auditors should use a statement that includes either (1) the language in paragraph modified to indicate the requirements that were not followed, or (2) language indicating that the auditors did not follow GAS.

GAGAS 9.03

Auditing Standards: Report Format

Auditors should issue audit reports communicating the results of each completed performance audit.

Auditors should issue the audit report in a form that is appropriate for its intended use, either in writing or in some other retrievable form.

Auditing Standards: Report Content

Auditors should prepare audit reports that contain

- (1) the objectives, scope, and methodology of the audit;
- (2) the audit results, including findings, conclusions, and recommendations, as appropriate;
- (3) a summary of the views of responsible officials; and (4) if applicable, the nature of any confidential or sensitive information omitted.

Auditing Standards: Report Content

Auditors should communicate audit objectives in the audit report in a clear, specific, neutral, and unbiased manner that includes relevant assumptions. In order to avoid potential misunderstanding, when audit objectives are limited but users could infer broader objectives, auditors should state in the audit report that certain issues were outside the scope of the audit.

Auditing Standards: Report Content

Auditors should describe the scope of the work performed and any limitations, including issues that would be relevant to likely users, so that report users can reasonably interpret the findings, conclusions, and recommendations in the report without being misled. Auditors should also report any significant constraints imposed on the audit approach by information limitations or scope impairments, including denials of, or excessive delays in, access to certain records or individuals.

Auditing Standards: Report Content

In describing the work performed to address the audit objectives and support the reported findings and conclusions, auditors should, as applicable, explain the relationship between the population and the items tested; identify entities, geographic locations, and the period covered; report the kinds and sources of evidence; and explain any significant limitations or uncertainties based on the auditors' overall assessment of the sufficiency and appropriateness of the evidence in the aggregate.

Auditing Standards: Report Content

In reporting audit methodology, auditors should explain how the completed audit work supports the audit objectives, including the evidence-gathering and evidence-analysis techniques, in sufficient detail to allow knowledgeable users of their reports to understand how the auditors addressed the audit objectives. Auditors should identify significant assumptions made in conducting the audit; describe comparative techniques applied; describe the criteria used; and, when the results of sample testing significantly support the auditors' findings, conclusions, or recommendations, describe the sample design and state why the design was chosen, including whether the results can be projected to the intended population.

Auditing Standards: Report Content

The report should be:

Accurate: An accurate report is supported by sufficient, appropriate evidence with key facts, figures, and findings being traceable to the audit evidence.

Objective: Objective means that the presentation of the report is balanced in content and tone. A report's credibility is significantly enhanced when it presents evidence in an unbiased manner and in the proper context.

Complete: Being complete means that the report contains sufficient, appropriate evidence needed to satisfy the audit objectives and promote an understanding of the matters reported.

Convincing: Being convincing means that the audit results are responsive to the audit objectives, that the findings are presented persuasively, and that the conclusions and recommendations flow logically from the facts presented.

Auditing Standards: Report Content

Clear: Clarity means the report is easy for the intended user to read and understand. Preparing the report in language as clear and simple as the subject permits assists auditors in achieving this goal.

Concise: Being concise means that the report is no longer than necessary to convey and support the message. Extraneous detail detracts from a report and may even conceal the real message and confuse or distract the users.

Timely: To be of maximum use, providing relevant evidence in time to respond to officials of the audited entity, legislative officials, and other users' legitimate needs is the auditors' goal.



Auditing Standards: Report Conclusions

Reporting Findings, Conclusions, and Recommendations 9.18 In the audit report, auditors should present sufficient, appropriate evidence to support the findings and conclusions in relation to the audit objectives. Auditors should provide recommendations for corrective action if findings are significant within the context of the audit objectives.

Auditors should report conclusions based on the audit objectives and the audit findings.

Auditing Standards: Report Conclusions

Auditors should describe in their report limitations or uncertainties with the reliability or validity of evidence if (1) the evidence is significant to the findings and conclusions within the context of the audit objectives and (2) such disclosure is necessary to avoid misleading the report users about the findings and conclusions. Auditors should describe the limitations or uncertainties regarding evidence in conjunction with the findings and conclusions, in addition to describing those limitations or uncertainties as part of the objectives, scope, and methodology.

.

Auditing Standards: Report Conclusions

Auditors should place their findings in perspective by describing the nature and extent of the issues being reported and the extent of the work performed that resulted in the findings. To give the reader a basis for judging the prevalence and consequences of these findings, auditors should, as appropriate, relate the instances identified to the population or the number of cases examined and quantify the results in terms of dollar value or other measures. If the results cannot be projected, auditors should limit their conclusions appropriately

Auditing Standards: Report Conclusions

When reporting on the results of their work, auditors should disclose significant facts relevant to the objectives of their work and known to them that if not disclosed could mislead knowledgeable users, misrepresent the results, or conceal significant improper or illegal practices.

Auditing Standards: Report Conclusions

When feasible, auditors should recommend actions to correct deficiencies and other findings identified during the audit and to improve programs and operations when the potential for improvement in programs, operations, and performance is substantiated by the reported findings and conclusions. Auditors should make recommendations that flow logically from the findings and conclusions, are directed at resolving the cause of identified deficiencies and findings, and clearly state the actions recommended.

Auditing Standards: Reporting Fraud

Reporting on Instances of Fraud 9.40 Auditors should report a matter as a finding when they conclude, based on sufficient, appropriate evidence, that fraud either has occurred or is likely to have occurred that is significant to the audit objectives.

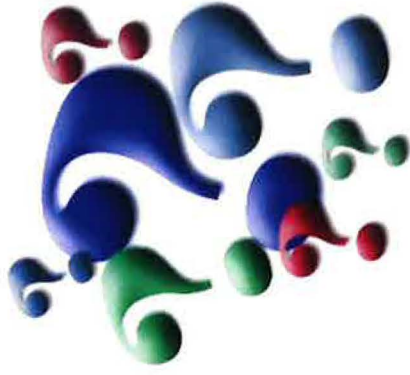
Auditors should communicate findings in writing to audited entity officials when the auditors detect instances of fraud that are not significant within the context of the audit objectives but warrant the attention of those charged with governance.

When auditors conclude fraud has occurred or is likely to have occurred, auditors may consult with authorities or legal counsel about whether publicly reporting such information would compromise investigative or legal proceedings. Auditors may limit their public reporting to matters that would not compromise those proceedings and, for example, report only on information that is already a part of the public record.

Auditing Standards: Discovery of Insufficient Evidence after Report Released

If, after the report is issued, the auditors discover that they did not have sufficient, appropriate evidence to support the reported findings or conclusions, they should communicate in the same manner as that used to originally distribute the report to those charged with governance, the appropriate officials of the audited entity, the appropriate officials of the entities requiring or arranging for the audits, and other known users, so that they do not continue to rely on the findings or conclusions that were not supported. If the report was previously posted to the auditors' publicly accessible website, the auditors should remove the report and post a public notification that the report was removed. The auditors should then determine whether to perform the additional audit work necessary to either reissue the report, including any revised findings or conclusions, or repost the original report if the additional audit work does not result in a change in findings or conclusions.

Questions?



Presidential Documents

Title 3—

Executive Order 13793 of April 27, 2017

The President

Improving Accountability and Whistleblower Protection at the Department of Veterans Affairs

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose. This order is intended to improve accountability and whistleblower protection at the Department of Veterans Affairs (VA) by directing the Secretary of Veterans Affairs (Secretary) to establish within the VA an Office of Accountability and Whistleblower Protection and to appoint a Special Assistant to serve as Executive Director of the Office.

Sec. 2. Establishing a VA Office of Accountability and Whistleblower Protection. (a) Within 45 days of the date of this order, and to the extent permitted by law, the Secretary shall establish in the VA the Office of Accountability and Whistleblower Protection (Office), and shall appoint a Special Assistant, reporting directly to the Secretary, to serve as Executive Director of the Office. The VA shall provide funding and administrative support for the Office, consistent with applicable law and subject to the availability of appropriations.

(b) To the extent permitted by law, the Office shall:

(i) advise and assist the Secretary in using, as appropriate, all available authorities to discipline or terminate any VA manager or employee who has violated the public's trust and failed to carry out his or her duties on behalf of veterans, and to recruit, reward, and retain high-performing employees;

(ii) identify statutory barriers to the Secretary's authority to discipline or terminate any employee who has jeopardized the health, safety, or well-being of a veteran, and to recruit, reward, and retain high-performing employees; and report such barriers to the Secretary for consideration as to the need for legislative changes;

(iii) work closely with relevant VA components to ensure swift and effective resolution of veterans' complaints of wrongdoing at the VA; and

(iv) work closely with relevant VA components to ensure adequate investigation and correction of wrongdoing throughout the VA, and to protect employees who lawfully disclose wrongdoing from retaliation.

(c) In establishing the Office, the Secretary shall consider, in addition to any other relevant factors:

(i) whether some or all of the functions of the Office are currently performed by an existing VA office, component, or program;

(ii) whether certain administrative capabilities necessary for operating the Office are redundant with those of another VA office, component, or program; and

(iii) whether combining the Office with another VA office, component, or program may improve the VA's efficiency, effectiveness, or accountability.

Sec. 3. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

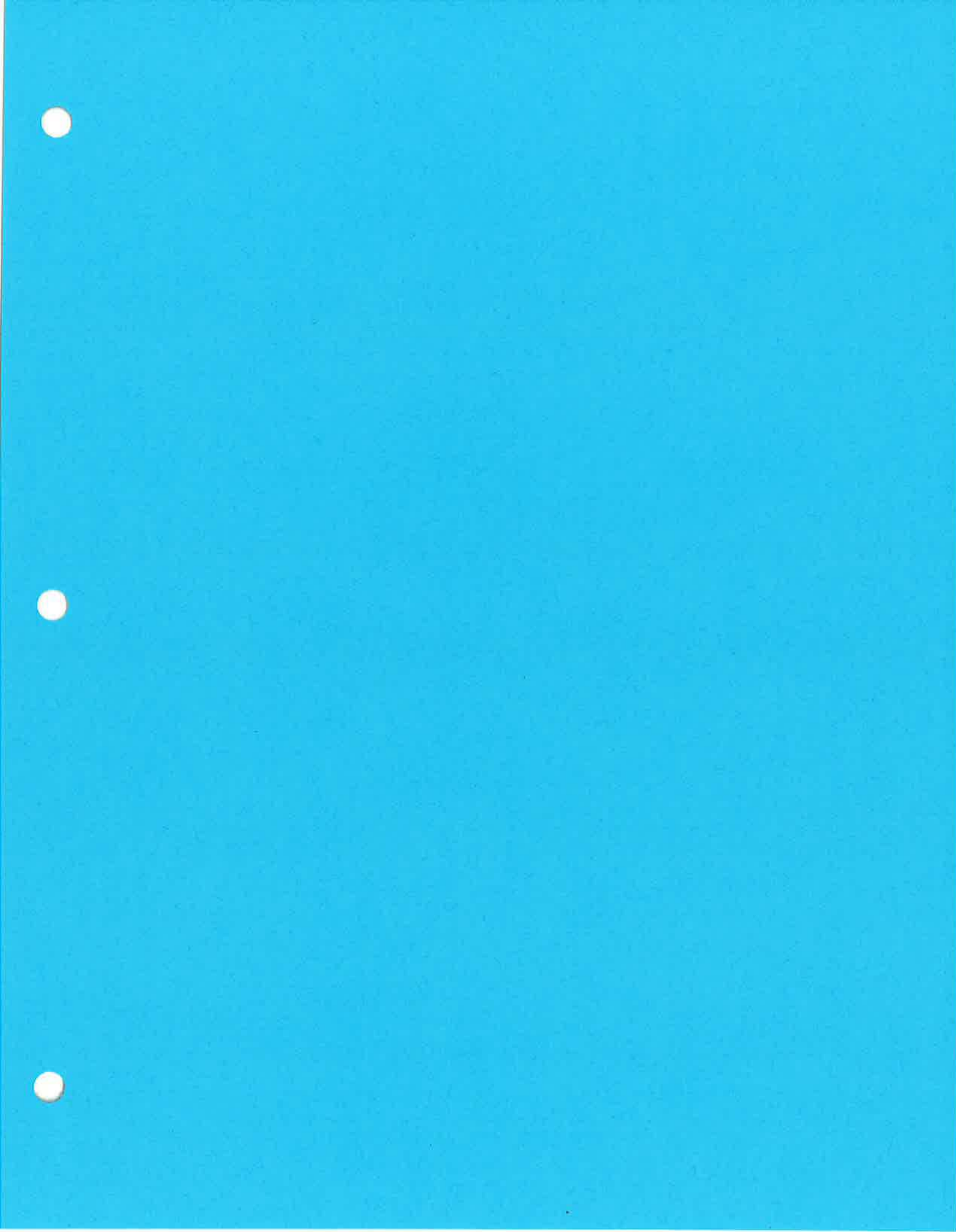
(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
April 27, 2017.



CHECKLIST FOR INVESTIGATING OFFICERS

1. Preliminary Matters:

- a. Has the appointing authority designated, in writing, the appropriate investigating officer based on availability, experience, and expertise?
- b. Is there an appointment memorandum/letter that clearly states the purpose and scope of the investigation, the points of contact for assistance (if appropriate), and the nature of the findings and recommendations required?
- c. If necessary or determined to be part of the process, has the initial legal briefing been accomplished or initial coordination conducted with OGC?

2. Investigative Plan.

- a. Does the investigative plan outline the background information that must be gathered, identify the witnesses who must be interviewed, and order the interviews in the most effective manner?
- b. Does the plan identify witnesses no longer in the agency and address alternative ways of interviewing them?
- c. Does the plan identify information not immediately available and outline steps to quickly obtain the information?

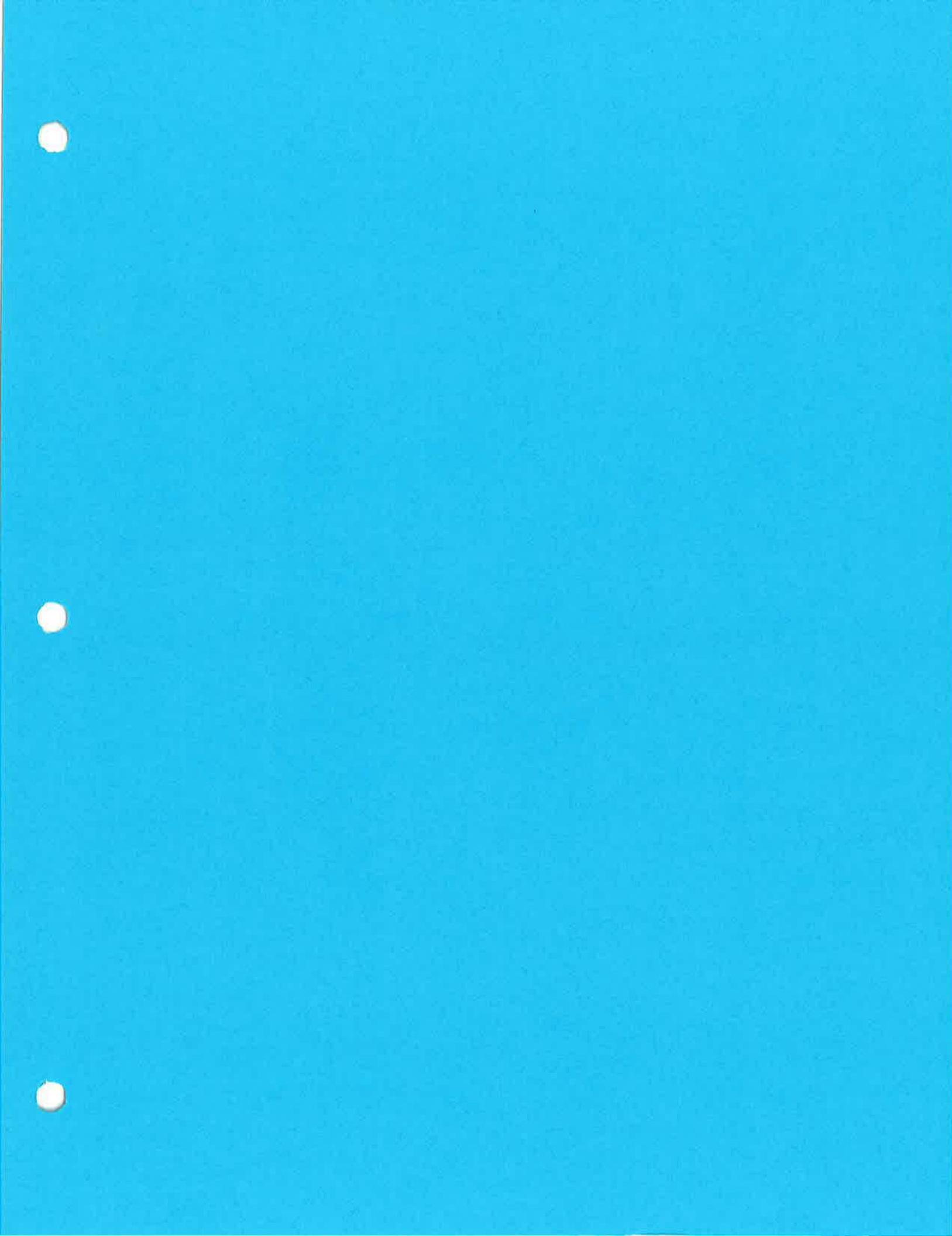
3. Conducting the Investigation.

- a. Is the chronology being maintained in sufficient detail to identify causes for unusual delays?
- b. Is the information collected (witness statements, MFR'S of phone conversations, photographs, etc.) being retained and organized?
- c. Is routine coordination with the legal advisor being accomplished?

4. Preparing Findings and, if applicable, Recommendations.

- a. Is the evidence assembled in a logical and coherent fashion?
- b. Does the evidence support the findings (including unsubstantiated findings, findings of no fault, or no misconduct)? Does each finding cite the exhibits that support it?
- c. Are the recommendations supported by the findings? Does each recommendation cite the findings that support it?
- d. Are the findings, and if applicable, recommendations responsive to the tasking in the appointment document?
- e. Did the investigation address all the issues (including systemic breakdowns; failures in supervision, oversight, or leadership; program weaknesses; accountability for errors; and other relevant areas of inquiry) raised directly or indirectly by the appointment?

5. Final Action. Was an appropriate legal review conducted?



SCOPE OF OAWP INVESTIGATIONS AND REFERRALS FOR INVESTIGATION

OAWP accepts disclosures from VA employees and applicants for VA employment alleging:

- a potential violation of any law, rule or regulation;
- gross mismanagement or gross waste of funds;
- abuse of authority; or
- substantial and specific danger to public health or safety.

OAWP directly investigates whistleblower disclosures that raise allegations of misconduct, retaliation, or poor performance involving:

- VA senior executives;
- VA employees in a confidential, policy-making, policy-determining, or policy-advocating position; and
- supervisory employees, if the allegation involves retaliation against a VA employee for making a whistleblower disclosure.

All other whistleblower disclosures are either referred out to another VA investigative entity with oversight provided by OAWP or, because they fall outside of OAWP's scope, are closed-out by OAWP and, if appropriate, routed to another VA investigative entity.

Examples of matters outside of OAWP's scope:

- allegations involving crimes (see 38 C.F.R. § 1.204): closed-out by OAWP and transmitted to VA's Office of Inspector General;
- allegations made by non-VA employees and applicants for employment (see 38 U.S.C. § 323(g)(3)): transmitted by OAWP to the responsible VA administration or staff office; and
- allegations involving equal employment opportunity (EEO) discrimination, EEO reprisal, sexual harassment, and hostile work environment (see VA Directive 5977): OAWP notifies the disclosing individual that he or she may contact VA's Office of Resolution Management.

JOB TASK CHECKLIST FOR INVESTIGATORS

(Appendix A from CIGIE Quality Standards for Investigations Handbook)

Receipt, Analysis, and Disposition of Allegations(s)

- ☐ Obtain data from complainant or source
- ☐ Document complaint in writing
- ☐ Know prosecutive or regulatory criteria
- ☐ Identify violations (elements of crime) or administrative standards
- ☐ Review and identify significant information or potential evidence
- ☐ Determine correct disposition of complaint (criminal, civil, or administrative)
- ☐ Open investigation, if appropriate, and coordinate with appropriate authorities (internally/externally)

Assessment, Focus, and Preparation of Investigative Plan

- ☐ Review available information and evidence
- ☐ Review legal decisions and guidelines
- ☐ Review agency programs, operational policies, and procedures
- ☐ Determine focus and scope of investigation
- ☐ Assess and identify required resources
- ☐ Identify potential witnesses, suspects, relevant documents, and evidence
- ☐ Organize and prioritize investigative activities
- ☐ Prepare initial investigative plan

Conduct Investigation

- ☐ Maintain focus and follow investigative plan (revise as necessary)
- ☐ Prepare for anticipated investigative activities (interviews, taking statements)
- ☐ Apply knowledge of laws and/or regulations
- ☐ Understand and apply techniques to ensure constitutional rights
- ☐ Project a professional image
- ☐ Use good oral and written communicative skills

- _ Know evidentiary rules
- _ Collect, analyze, and preserve evidence
- _ Use appropriate specialized techniques (search warrants, forensics, consensual monitoring)
- _ Conduct reviews and data inquiries and promptly document such activities
- _ Collect and analyze financial data
- _ Assess progress and re-focus when necessary
- _ Coordinate progress with supervisor (prosecutors or management, as appropriate)
- _ Maintain appropriate liaison
- _ Effectively manage the case and assist personnel and meet planned milestones
- _ Obtain IG or grand jury subpoenas and/or testify before grand jury

Review, Organize, and Evaluate Investigative Findings

- _ Review and understand the information gathered
- _ Organize the information and evidence gathered
- _ Correlate data, witnesses, and records
- _ Consider internal/external customer needs

Draft Report, Validate Contents, and Submit Final Report

- _ Write draft report--ensure accuracy, thoroughness, objectivity, proper format, clarity, and correct grammar
- _ Review report to ensure information is correct and complete
- _ Consider issues such as confidentiality, the Privacy Act, the Freedom of Information Act, and security classification
- _ Include disclosure caveats where appropriate
- _ Write final report
- _ Distribute to appropriate entities

Post-Investigative Tasks

- _ Know rules of criminal and/or civil procedure
- _ Assist with preparation for court/administrative proceedings

Job task checklist for investigators

- ☐ _ Serve witness subpoenas
- ☐ _ Assist U.S. Attorney/District Attorney at trial if applicable
- ☐ _ Testify at trial, if applicable
- ☐ _ Document and report results, dispositions, and outcomes
- ☐ _ Obtain disposition of exhibits and evidence after trial/hearing
- ☐ _ Return and document proper disposition of documents and evidence
- ☐ _ Review the organization of investigative files for efficient retrieval
- ☐ _ Archive investigative files
- ☐ _ Ensure information management database reflects accurate and final case information

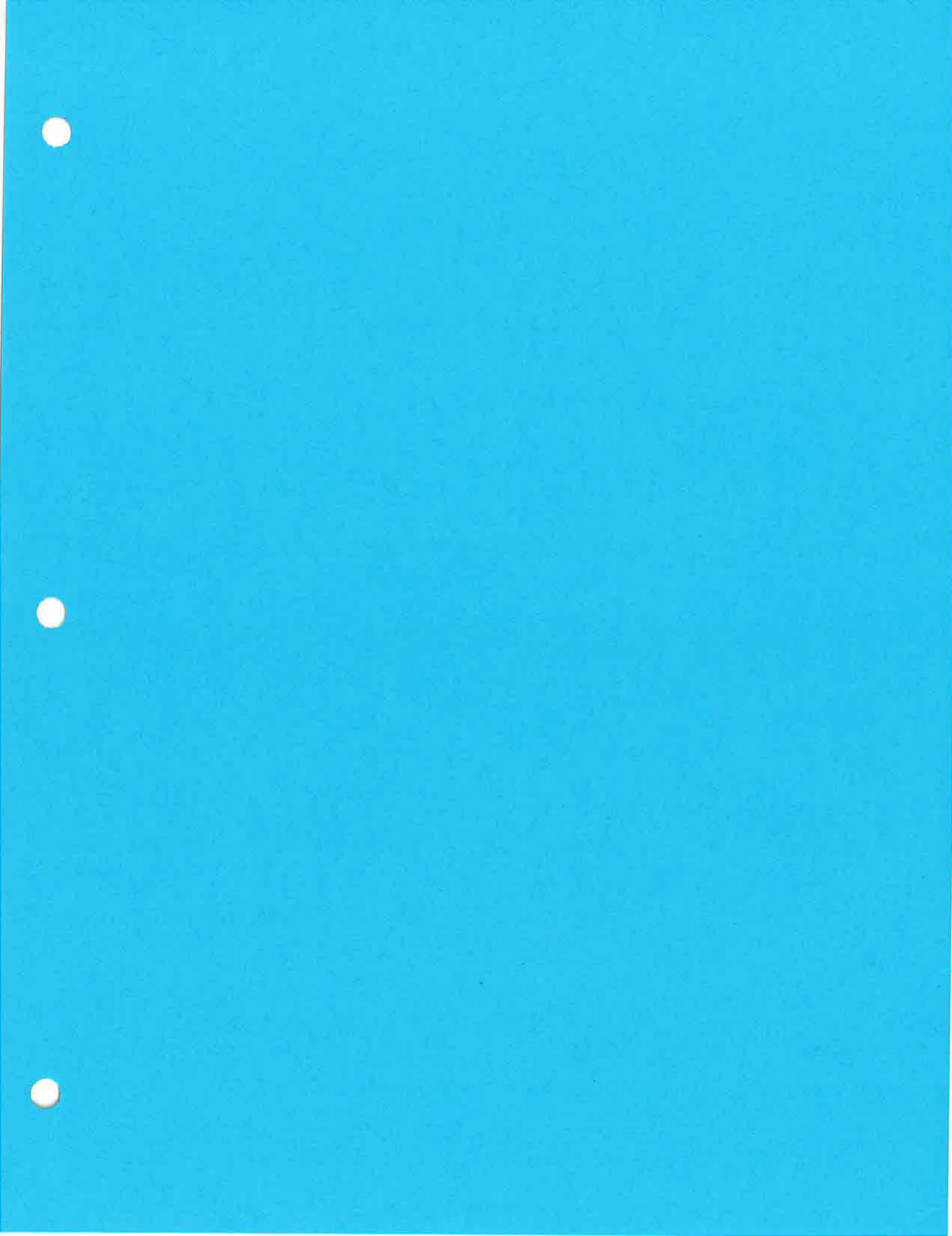
Appendix C
Non-Exhaustive Table of Legislation, Executive Orders,
Standards, Regulations, and Other Guidance for Investigators

Document	Description
1. Legislation	
Crimes, 18 U.S.C. §§ 1-2725 and Criminal Procedure, 18 U.S.C. §§ 3001-3771	Establishes crimes and criminal procedures as they pertain to OIG oversight of departmental programs.
Electronic Communications Protection Act, 18 U.S.C. §§ 2510-2522 (Wiretap Statute)	Limits the ability of law enforcement officers to intercept electronic communications without judicial authorization, and regulates the use and disclosure of information obtained through authorized wiretaps.
False Claims Act, 31 U.S.C. §§ 3729-3733 <u>et seq.</u> (P.L. 99-562)	Establishes civil liability for fraudulent claims submitted to the Federal Government.
Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g	Imposes additional restrictions on the use of administrative subpoenas to obtain educational records from an educational agency or institution.
Federal Conflict of Interest Laws, 18 U.S.C. §§ 202-209	Establishes criminal conflict of interest penalties for Federal employees.
Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80	Authorizes the public to bring civil lawsuits against the Federal Government for the negligent acts of Federal employees within the scope of their employment that cause injury to person or property.
Freedom of Information Act, as amended, 5 U.S.C. § 552 (P.L. 104-231)	Allows members of the public to obtain Federal records subject to certain exemptions (including exemptions for certain investigative information).
Health Insurance Portability and Accountability Act of 1996, 29 U.S.C. § 1181 (P.L. 104-191)	Protects the privacy of confidential personally identifiable medical information.
The Inspector General Act of 1978, as amended, 5 U.S.C. App. 3 (P.L. 95-452); Inspector General Reform Act of 2008, (P.L. 110-409)	Establishes independent and objective Offices of Inspector General; establishes IG subpoena power and other authorities.
Law Enforcement Availability Pay Act of 1994, 5 U.S.C. § 5545a	Authorizes additional pay to criminal investigators to ensure availability for unscheduled official duties.
Law Enforcement Officers Safety Act of 2003, Chapter 44, 18 U.S.C. § 926 B-C (P.L. 108-277)	Authorizes qualified law enforcement officers (including certain qualified retired officers) to carry a concealed firearm.
Pen/Trap Statute, 18 U.S.C. § 3121	Requires government entities to obtain a warrant before collecting real-time information, such as dialing, routing, and addressing information related to communications.
Privacy Act, 5 U.S.C. § 552a (P.L. 93-579)	Protects personal individual information held by Federal agencies, and authorizes individuals to obtain and to seek corrections to those records.

Procurement Integrity Act, 41 U.S.C. § 423	Prohibits the release of source selection and contractor bid or personal information and sets conflict of interest requirements for procurement personnel.
Program Fraud Civil Remedies Act, 31 U.S.C. § 3801 <u>et seq.</u>	Establishes an administrative process to allow Federal agencies to recover for fraudulent claims to the agency of up to \$150,000.
Right to Financial Privacy Act, 12 U.S.C. § 3401 <u>et seq.</u>	Requires that agencies provide individuals and partnerships with five or fewer partners with notice and an opportunity to object before a financial institution can disclose personal financial information in response to an administrative subpoena.
Stored Communications Act, 18 U.S.C. §§ 2701-2712	Limits the Government's ability to obtain stored account information from network service providers such as ISPs.
Trade Secrets Act, 18 U.S.C. § 1905	Prohibits government employees from disclosing certain confidential or proprietary business information.
Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1512-1515	Defines tampering with a witness, victim, or informant; requires Federal law enforcement agencies to have guidelines and policies to provide services to victims of crimes.
Whistleblower Protection Act, 5 U.S.C. § 1204, 22 U.S.C. § 4137	Protects the rights of, and prevents retaliation against, Federal employees who disclose governmental fraud, waste, abuse, and other improper activity.
5 U.S.C. §§ 8425(b), 8335	Authorizes agencies to exempt law enforcement officers from mandatory retirement at age 57 with 20 years of covered law enforcement service.
41 U.S.C. § 265	Prevents retaliation against contractor employees for certain disclosures of information relating to a substantial violation of law related to a contract.
2. Executive Orders	
Administrative Allegations Against Inspectors General, Exec. Order No. 12993, 61 Fed. Reg. 13043 (March 21, 1996)	Directs the PCIE and ECIE Integrity Committee to receive, review, and refer for investigation allegations of wrongdoing against IGs and certain staff members of OIGs (Note – superseded by passage of the Inspector General Reform Act of 2008).
Integrity and Efficiency in Federal Programs, Exec. Order No. 12805, 57 Fed. Reg. 20627 (May 11, 1992)	Establishes the PCIE and ECIE and describes their functions and responsibilities (note—superseded by passage of the Inspector General Reform Act of 2008).
Principles of Ethical Conduct for Government Officers and Employees, Exec. Order 12731, 55 Fed. Reg. 42547 (October 17, 1990)	Lays out principles of ethical conduct, Office of Government Ethics authority, agency responsibilities, delegations of authority, and general provisions.

3. Standards	
PCIE/ECIE Quality Standards for Federal Offices of Inspector General (Oct. 2003)	Establishes standards for the management, operation, and conduct of the Federal Offices of Inspector General.
Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR Part 2635 (June 2009)	Establishes general principles for ethical conduct of employees of the Executive Branch.
4. Other Guidance and Regulations	
Attorney General Guidelines for Domestic FBI Operations (Sept. 29, 2008)	Addresses the broad operational areas of the FBI's methods of investigative and intelligence gathering, including coordination, analysis and planning.
Attorney General Guidelines for Offices of Inspector General with Statutory Law Enforcement Authority (Dec. 8, 2003)	Governs the law enforcement authorities of OIGs that have been granted statutory law enforcement power from the Attorney General.
Attorney General's Guidelines on FBI Undercover Operations (Nov. 13, 1992)	Covers authorization of undercover operations, protecting innocent parties against entrapment, and monitoring and control of undercover operations.
Attorney General Guidelines Regarding the Use of Confidential Informants (May 2002)	Applies to the use of confidential informants in criminal investigations and prosecutions by Department of Justice law enforcement agencies and Federal prosecuting officers.
Attorney General Memorandum for the Heads and Inspectors General of Executive Departments and Agencies re: Procedures for Lawful, Warrantless Monitoring of Verbal Communications (May 30, 2002)	Revises and updates rules and procedures for obtaining authorization to intercept verbal communications without the consent of all parties to the communication, as well as the procedures for consensual monitoring where no written authorization is required.
Attorney General Order No. 3168-2010 – Authorization for the Federal Offices of Inspector General to Provide Mutual Assistance in the Execution of Search and Arrest Warrants (June 28, 2010)	Authorizes and sets conditions on OIG sharing of agents to seek and execute search, seizure or arrest warrants.
Attorney General Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses (" <i>Giglio</i> Policy") (Dec. 9, 1996)	Ensures that prosecutors receive sufficient information to meet their disclosure obligations under <i>Giglio v. United States</i> , while protecting the legitimate privacy rights of Government employees.
CIGIE Guidelines on Undercover Operations (June 2010)	Provides guidance on certain undercover operations in accordance with the Attorney General's Guidelines for Offices of Inspectors General.

CIGIE Qualitative Assessment Review Guidelines Federal Offices of Inspector General (Investigation Divisions) (May 2009)	Provides guidance on conducting external qualitative assessment reviews of OIG investigative operations.
CIGIE Procedures to Obtain Assistance From Another OIG In the Execution of Search and Arrest Warrants (Nov. 15, 2010)	Establishes procedures for OIG sharing of agents for search, seizure or arrest warrants.
Deputy Attorney General Guidance for Prosecutors Regarding Criminal Discovery (Jan. 10, 2010)	Provides guidance for prosecution team members (including IG agents) on the government's legal discovery obligations, including discovery of exculpatory and impeachment information as applied to electronic communications.
Deputy Attorney General Guidance on the Use, Prevention, and Disclosure of Electronic Communications in Federal Criminal Cases (March 30, 2011)	Provides guidance for prosecution team members (including IG agents) on legal discovery obligations relating to electronic communications among members of the prosecution team, victims and witnesses.
Deputy Attorney General Memorandum to Inspectors General Directing Them to Refer Potential Violations of Federal Privacy Statutes to the Department of Justice for Investigation and Prosecution (Oct. 18, 1999)	Directs Inspectors General to refer 18 U.S.C. § 1030(a)(2) offenses to the Computer Crimes and Intellectual Property Section in the Criminal Division; Tax Offenses to the Criminal Enforcement Office in the Tax Division; and Privacy Act Violations to the Public Integrity Section in the Criminal Division.
Federal Rules of Criminal Procedure, R. 1-17	Federal court rules governing preliminary proceedings, the grand jury, indictment, arraignment, and preparation for trial.
Federal Rules of Evidence, §§ 101-1103	Federal court rules for introduction of evidence in criminal or civil trials.
2 C.F.R. Part 180 OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)	Establishes causes, procedure and treatment of government-wide suspension and debarment for non-procurement (e.g., loan, guarantee, insurance and grant) actions. Please note individual agency adoption pieces in 2 C.F.R Subtitle B.
5 C.F.R. Part 731.204-05	Establishes causes and procedure for debarment from federal employment.
48 C.F.R. Subpart 3.9	Provides whistleblower protections for contractor employees and sets procedures for filing complaints, investigating complaints, and remedies.
48 C.F.R. Part 9.4 Procurement Suspension and Debarment Regulations	Establishes causes, procedure and treatment of government-wide suspension and debarment for procurement actions.
49 CFR § 1544.219: TSA Regulation regarding carriage of accessible weapons	Sets out situations when it is permissible for a law enforcement officer to carry a weapon aboard a plane.



YOUR RIGHTS AS A FEDERAL EMPLOYEE

ENFORCED BY
THE U.S. OFFICE OF SPECIAL COUNSEL

I. THE U.S. OFFICE OF SPECIAL COUNSEL (OSC) is an independent agency that investigates and prosecutes allegations of prohibited personnel practices (PPP).

WHAT IS A PROHIBITED PERSONNEL PRACTICE (PPP)?:

Under 5 U.S.C. §2302(b)(1)-(b)(12) a federal employee authorized to take, direct others to take, recommend or approve any personnel action may not:

- **Discriminate (including discrimination based on marital status and political affiliation).** *EXAMPLE: Supervisor Joe refuses to promote Employee Jane because Jane is a registered Republican; or his refusal is because she is a single mother. (OSC will generally defer Title VII discrimination allegations to the EEO process, rather than duplicating already existing procedures.)*
- **Solicit or consider employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics.** *EXAMPLE: Selecting Official Joe hires Applicant Jack based on Senator Smith's recommendation that Jack be hired because Jack is a constituent; or fails to hire Applicant Jane because of Congressman Smith's recommendation based on the Congressman's friendship with Jane's parents.*
- **Coerce the political activity of any person, or take action against any employee as reprisal for refusing to engage in political activity.** *EXAMPLE: Supervisor Jane takes away significant job duties of Employee Jack because Jack will not make a contribution to Jane's favorite candidate.*
- **Deceive or willfully obstruct any person from competing for employment.** *EXAMPLE: Supervisor Joe, located in Headquarters, orders that no vacancy*
- **Engage in nepotism.** *EXAMPLE: Second-level Supervisor Jane asks First-level Supervisor Joe to hire her son; or to promote her daughter.*
- **Take a personnel action against an employee because of whistleblowing.** *EXAMPLE: Supervisor Joe directs the geographic reassignment of Employee Jack because Jack reported safety violations to the agency's Inspector General; or because employee Jill reported a gross waste of funds to the Office of Internal Affairs.*
- **Take a personnel action against any employee because of the exercise of an appeal, complaint, or grievance right.** *EXAMPLE: Supervisor Jane places Employee Jack on an undesirable detail because Employee Jack filed an administrative grievance about his performance rating.*
- **Discriminate against an employee on the basis of conduct, which does not adversely affect the performance of the employee.** *EXAMPLE: Jack's employment is terminated because he attended an event for an issue or a cause, such as an animal rights rally.*
- **Take or fail to take a personnel action, if such action would violate a veterans' preference requirement.** *Example: Supervisor Jane hired Employee Jack, without considering Veteran Jennifer, who was included on the list of eligible employees. (OSC's jurisdiction is for*

announcements be posted in the field office where Employee Jack works because he does not want Jack to get a new job; or falsely states that there will be extensive travel in the position when he knows that there is no travel.

- **Influence any person to withdraw from competition for a position to improve or injure the employment prospects of any other person. EXAMPLE:** Supervisor Jane, in an effort to hire Employee Joe, tells Employee Jack that he should not apply for a position because he is not qualified and will never be selected. Employee Jack is qualified.
- **Give an unauthorized preference to a person to improve or injure the employment prospects of any particular employee or applicant. EXAMPLE:** Supervisor Jane specifies that Spanish-speaking skills are necessary for a vacant position, for the purpose of selecting Employee Jack, who speaks fluent Spanish. The position, however, does not require Spanish-speaking skills..

disciplinary actions only; the Dept. of Labor has jurisdiction to investigate for corrective actions.).

- **Take a personnel action against an employee which violates a law, rule, or regulation which implements a merit systems principle. EXAMPLE:** Supervisor Joe terminates the probationary appointment of Employee Jack because of Jack's letter to the editor criticizing affirmative action - a valid exercise of First amendment rights, a law implementing a merit system principle.
- **Implement or enforce a nondisclosure agreement or policy lacking notification of whistleblower rights. EXAMPLE:** A manager requires all employees in his program to sign a non-disclosure agreement that prohibits the employees from discussing the program in any way, and fails to notify employees of protected channels for making disclosures.

What You Can Do If You Believe A PPP Has Been Committed

An employee who believes a PPP has been committed can file a written complaint with the U.S. Office of Special Counsel. Complaint forms are available on the Web at www.osc.gov. Employees do not need attorneys to file a complaint. OSC is an independent and prosecutorial agency. It will investigate allegations of prohibited personnel practices, and seek any corrective and disciplinary action.

II. The U.S. Office of Special Counsel Also Receives Confidential Disclosures and Enforces The Hatch Act

RECEIVING CONFIDENTIAL DISCLOSURES (5 U.S.C. §1213):

Current and former federal employees and applicants can confidentially report information evidencing a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The OSC has the authority to require the head of the agency concerned to investigate the matter if OSC determines that a disclosure has been made.

ENFORCING THE HATCH ACT(5 U.S.C. §7321-26):

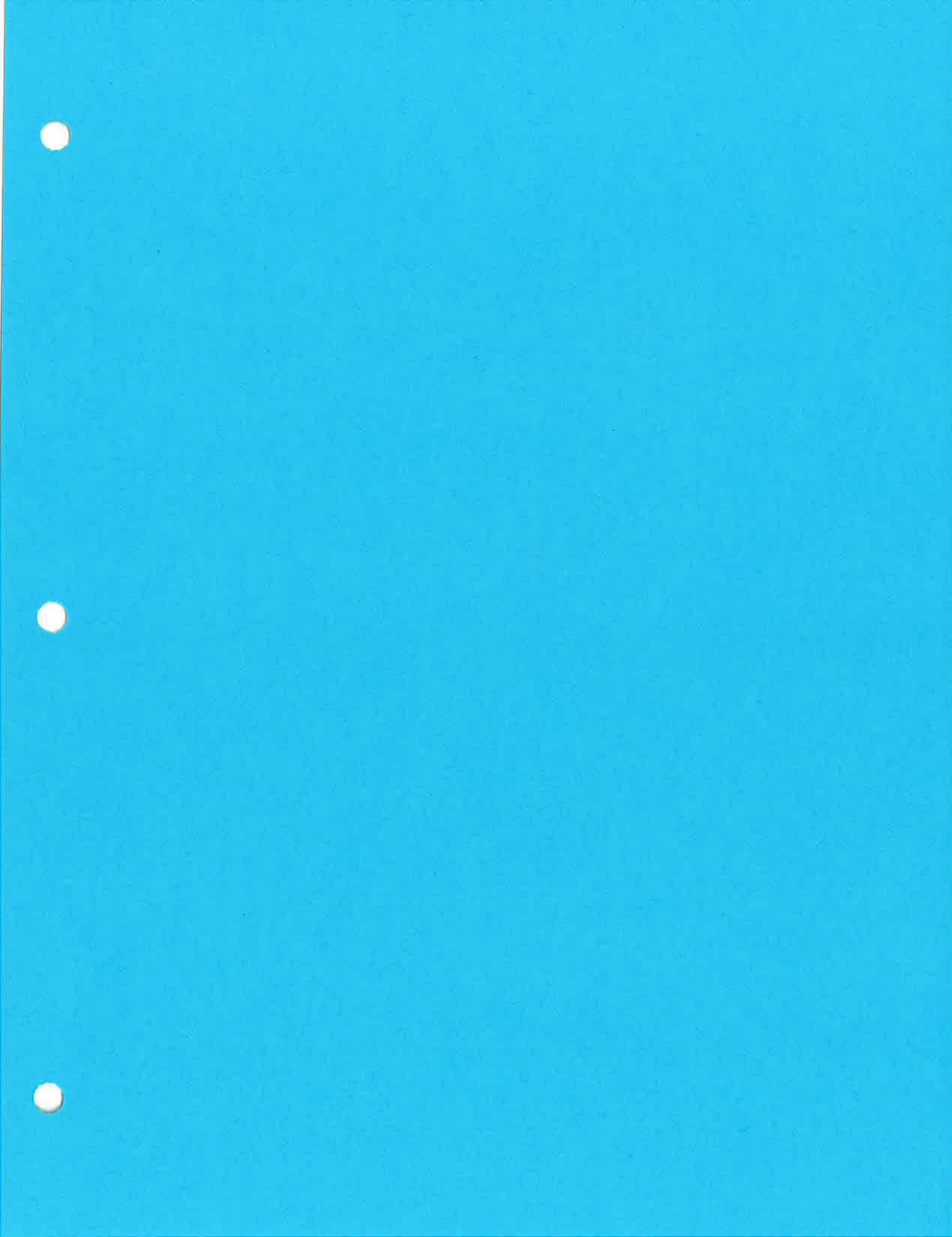
The Office of Special Counsel is authorized to issue advisory opinions that respond to federal employee questions about whether or not they may engage in specific political activities under the Act. The OSC also prosecutes violations of the Hatch Act before the Merit Systems Protection Board. These violations include: using official authority to interfere with an election result; soliciting, accepting or receiving political contributions; soliciting or discouraging political activity of persons before the employing agency; and running for public office in a partisan political election.

Need Additional Information?

- Information on filing a complaint: 202-254-3600 or 800-872-9855.
- Information on making a disclosure: 202-254-3640 or 800-572-2249.
- Updated and detailed information on OSC and its procedures- visit our web page:
<http://www.osc.gov>.
- Updated and detailed information on OSC in our revised brochure:
"The Role of the U.S. Office of Special Counsel"
(GPO # 028-004-00105-9) by calling 202-512-1800 - the GPO Bookstore.



U.S. Office of Special Counsel
1730 M Street N.W., Suite 201
Washington D.C. 20036-4505



UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PHILLIP G. HILLEN,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency,

and

OFFICE OF THE SPECIAL COUNSEL,
Intervenor.

DOCKET NUMBER
DC07528510324-1

DATE: NOV 23 1987

Edward H. Passman, Esquire, Passman and Broida,
Washington, D.C., for the appellant.

William J. Merrigan, Esquire, and Sam Horn, Esquire,
Falls Church, Virginia, for the agency.

Bruce D. Fong, Esquire, Office of the Special
Counsel, Washington, D.C., for the intervenor.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

Member Devaney concurs in the result.

OPINION AND ORDER

The Office of Special Counsel and the agency have petitioned for review of the administrative judge's second initial decision, issued on June 13, 1986, that did not

sustain the agency's removal of the appellant.¹ For the reasons set forth below, the Board GRANTS the petitions. The initial decision is VACATED and the case is REMANDED to the Washington Regional Office for further adjudication in accordance with this Opinion and Order. Further, for the reasons set forth below, the Board DENIES the appellant's cross petition for review. 5 C.F.R. § 1201.115.

BACKGROUND

Agency Action.

The agency removed the appellant, a Senior Executive Service official of the Military Traffic Management Command (MTMC) for sexual harassment of five female employees at the command. The charge resulted from investigations initiated by a complaint filed with the Inspector General's (IG) office by Captain Nancy Daugherty. After investigation, the Inspector General's report found that the appellant had sexually harassed Captain Daugherty and another woman and engaged in inappropriate behavior with two additional women. Because the Office of the Inspector General did not release the evidence supporting its report, the command then initiated its own investigation on which it based this removal action.

¹ We have not considered Part II of the agency's response to the appellant's cross-petition for review, since the Board's regulations do not provide for submission of a reply to the response to a petition for review. See 5 C.F.R. § 1201.114.

First Initial Decision.

The appellant appealed his removal to the Board's Washington Regional Office. After hearing testimony from Major General Harold S. Small (the deciding official), Captain Daugherty, Ms. Geneva Byars, and Ms. Jan Ingerski, the administrative judge granted the appellant's motion for summary judgment. He found that the appellant's conduct did not constitute sexual harassment and issued an initial decision not sustaining the agency action. The agency petitioned for review of the administrative judge's initial decision. The Office of the Special Counsel (OSC) intervened and also petitioned for review of the initial decision.

Board Remand.

In a decision dated January 28, 1986, the Board found that the administrative judge had erred in granting the appellant's motion for summary judgment, and that the agency had established a prima facie case of sexual harassment against the appellant with regard to the specification concerning Captain Daugherty and the portion of the specification regarding the appellant's touching of Ms. Byars. The Board further found that the appellant's conduct toward Ms. Schaefer could constitute sexual harassment, but that the record contained insufficient information about the context of the conduct and its effect. Accordingly, the case was remanded to the regional office for completion of the hearing and issuance of a new initial

decision. *Hillen v. Department of the Army*, 29 M.S.P.R. 690 (1986). Specifications concerning three women remained in issue.

The first of these three women, Captain Nancy Daugherty, alleged that, in the fall of 1983, the appellant crossed an elevator in which they were riding and took her hand, which she had tucked under her arm for warmth. In the process of taking her hand, the appellant touched her breast. Several months later the appellant entered her office and rubbed his hand down her buttocks and thigh. The appellant claimed he was brushing a chalky substance off her skirt. Several weeks after that incident, Captain Daugherty answered the telephone in her office. After identifying her department and herself, she asked, "May I help you, sir?" The appellant, without immediately identifying himself or stating his business, responded, "What would you like to do?" He repeated the remark before identifying himself and asking to speak with her supervisor. Captain Daugherty also stated that the appellant had a practice of looking at her in a sexually suggestive manner. The appellant was charged with this conduct under Specification a. Agency File, Tab B-9.

The second of the three women whose allegations remained at issue was Ms. Geneva Byars. Ms. Byars alleged that the appellant engaged in unwelcome touching of her. (In her hearing testimony, Ms. Byars stated that on one occasion the appellant touched her breast.) The appellant

was charged with this conduct under Specification b. Agency File, Tab B-9.

The third woman, Ms. Cynthia Schaefer, alleged that, in approximately 1981, when she was a Clerk-Typist, the appellant frequently stopped her in the hallway. The appellant expressed an interest in having her join his intern program and invited her to his office to discuss it. The appellant persisted, although Ms. Schaefer told him that she was not interested in the intern program and that her supervisor was assisting her to find an upward mobility position. On one occasion during a hallway encounter, the appellant blocked her so that she could not easily leave the area. Her supervisor, Mr. Andrews, stated that Ms. Schaefer came to him in approximately 1983 to ask him whether she had to go to the appellant's office when the appellant asked her to, and Mr. Andrews advised her that she did not have to go. Ms. Schaefer also complained that the appellant looked at her body in a sexually suggestive way. The appellant was charged with this conduct under Specification e. Agency File, Tab B-9.

Second Initial Decision.

On remand, the administrative judge took additional testimony. He issued a new initial decision on June 13, 1986, again finding that the appellant's conduct did not constitute sexual harassment. The administrative judge found that the appellant had not touched Ms. Byars's breast and that the appellant's other actions were not of a sexual

nature, were not pervasive, and did not affect the psychological well-being of the women.

Petitions for Review of Second Initial Decision.

On July 16, 1986, the OSC, as intervenor, filed its petition for review of the second initial decision, contending that the administrative judge erred in his interpretation of 29 C.F.R. § 1604.11(a), the regulation governing sexual harassment claims, and that the administrative judge's factual findings were not supported by the record. The agency also has filed a petition for review contending that the administrative judge erred in his interpretation of the law regarding sexual harassment and in his factual findings. The appellant has responded to the petitions for review, disputing the arguments made by the agency and OSC, and has submitted a cross petition for review, alleging that the administrative judge erred by failing to admit polygraph evidence.

DISCUSSION AND ANALYSIS

The administrative judge failed to resolve essential credibility issues and to provide adequate support for the credibility findings that he did make.

As the Board has consistently stated, an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law. See, e.g., *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). The initial decision on remand fails to meet these standards, particularly with regard to

the administrative judge's responsibility to resolve credibility issues.

To resolve credibility issues, an administrative judge must first identify the factual questions in dispute; second, summarize all of the evidence on each disputed question of fact; third, state which version he or she believes; and, fourth, explain in detail why the chosen version was more credible than the other version or versions of the event. Numerous factors, which will be considered in more detail below, must be considered in making and explaining a credibility determination. These include: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor.

1. The Opportunity and Capacity to Observe the Event or Act.

Personal knowledge of the event or act at issue is an essential qualification of a witness, and the requisite personal knowledge is established by evaluation of the witness's opportunity, as to place, time, proximity, and similar factors, to observe the event or act in issue.

3A Wigmore on Evidence § 1005(f) (Chadbourn rev. 1978).
These factors relating to a witness's opportunity to observe

are material in determining the witness's credibility. *Id.* See, e.g., *Pitchford v. Department of Justice*, 14 M.S.P.R. 608, 612-13 (1983) (the administrative judge erred by not crediting witnesses who were close enough to the disputed events to know that a verbal exchange between the appellant and his superior did not occur). The witness's capacity to observe refers to his or her ability to understand what was seen and intelligently narrate it. 3A Wigmore on Evidence § 993 (Chadbourn rev. 1970). See, e.g., *Wright v. Department of Transportation*, 24 M.S.P.R. 550, 553 (1984) (the appellant's version of a meeting was credible because it was based on contemporaneous notes made immediately after the meeting).

2. Character.

Character evidence may be used for impeachment of a witness on the theory that certain characteristics render that person more prone to testify untruthfully. 3 Weinstein's Evidence, para. 608[01] (1985). This form of impeaching evidence may be established by prior misconduct or reputation. See, e.g., *Stewart v. Office of Personnel Management*, 8 M.S.P.R. 289, 297 (1981) (previous falsification diminishing credibility); *Pedersen v. Department of Transportation*, 9 M.S.P.R. 195, 198-99 (1981) (poor reputation for truthfulness diminishing credibility).

3. Prior Inconsistent Statement.

The effect of a prior inconsistent statement is not that the present testimony is false but that the very fact

of the inconsistency raises doubt as to the truthfulness of both statements. 3 Weinstein's Evidence, para. 607[06] (1985), quoting McCormick on Evidence, § 34 (1954). The form of the inconsistency, whether oral, in writing, or by conduct, is immaterial and the statements or conduct need not be in direct conflict. 3A Wigmore on Evidence §§ 1040(1), (2), and (5) (Chadbourn rev. 1970). See, e.g., *Greco v. Department of Transportation, Federal Aviation Administration*, 15 M.S.P.R. 210, 215 (1983) (failure of the appellant to deny the charges when responding to the proposed adverse action makes a subsequent denial less credible); *Schaefer v. Department of Justice*, 25 M.S.P.R. 277, 281 (1984) (it is not error for an administrative judge to accord little weight to an affidavit inconsistent with two prior statements by the witness). Inconsistencies, however, do not necessarily render testimony incredible. See, e.g., *Cochran v. Department of Justice, Immigration and Naturalization Service*, 16 M.S.P.R. 343, 347 n.2 (1983) (inconsistencies found to be inadvertent).

4. Bias.

The possibility of bias is always significant in assessing a witness's credibility. Bias rests on the assumptions that certain relationships and circumstances impair the impartiality of a witness and that a witness who is not impartial may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties. Weinstein's Evidence para. 607[03] (1985). The

trier of fact must be sufficiently informed of the underlying relationships, circumstances, and influences operating on the witness, so that in the light of his or her experience, he or she can determine whether a mutation in the testimony could reasonably be expected as a probable human reaction. *Id.* See, e.g., *Paniagua v. General Services Administration*, 23 M.S.P.R. 229, 233 (1984) (the attempt of the appellant's estranged wife to have him fired and her unjustified accusations that the appellant engaged in theft, lying, and various other improprieties leads to questioning of her credibility); *Bowers v. United States Postal Service*, 3 M.S.P.R. 562, 564-65 (1980) (the administrative judge's failure to consider evidence that the agency had coerced at least one witness and the impact of coercion on the credibility of all the witnesses was error).

One aspect of bias is the question of self-serving testimony. Although the fact that a witness's testimony may be self-serving does not by itself provide sufficient grounds for disbelieving that testimony, it is a factor for consideration in assessing the probative weight of the evidence. See *Spezzaferro v. Federal Aviation Administration*, 807 F.2d 169, 173 n.2 (Fed. Cir. 1986); *Sanders v. United States Postal Service*, 801 F.2d 1328, 1332 (Fed. Cir. 1986); *Hall v. Veterans Administration*, 7 M.S.P.R. 161, 162-63 (1981).

5. Contradiction by or Consistency with Other Evidence.

Contradiction is the calling of one or more witnesses who deny the fact or facts asserted by another witness and maintain that the opposite is the truth; the contradiction in itself does nothing probatively unless the contradicting witness or witnesses is believed in preference to the first witness. 3A Wigmore on Evidence, § 1000 (Chadbourn rev. 1970). Contradiction rests on the inference that if a witness is mistaken about one fact, he or she may be mistaken about more facts and therefore his or her testimony is untrustworthy. 3 Weinstein's Evidence, para. 607[05] (1985). See, e.g., *Seavello v. Department of the Navy*, 4 M.S.P.R. 155, 157 (1980) (testimony that witness retrieved illegally produced posters from a beauty shop was discredited by contradictory testimony of present and former owners of the shop). But see *Glenroy Construction Co. Inc. v. NLRB*, 527 F.2d 465 (7th Cir. 1975) (merely because a witness is not contradicted, it does not necessarily mean that his or her testimony is to be credited); *Antonucci v. Department of Justice*, 8 M.S.P.R. 491 (1981) (discrediting of a witness on one issue does not require the administrative judge to discredit the witness on all other issues).

On the related topic of polygraph evidence, the Board has previously stated that the admissibility of polygraph results is a matter within the authority of the administrative judge. See *Meier v. Department of Interior*, 3 M.S.P.R. 247, 253 (1980). In finding polygraph results

admissible, the Board does not imply that the results of such a test must be accepted into evidence. *Id.* Compare, *United States V. Gordon*, 688 F.2d 42, 45 (8th Cir. 1982) (it was not an abuse of discretion for a trial court to exclude the results of one exculpatory and one inconclusive polygraph examination).²

² It is with regard to this aspect of credibility determinations that the appellant's contention in his cross petition for review -- that the administrative judge erred in not admitting the results of his second voluntary polygraph test -- must be considered.

Prior to the first hearing, the appellant requested as a witness Mr. Howard L. Miller, the licensed polygraph operator who conducted two polygraph examinations of the appellant. The results of the first examination were presented to the deciding official as part of the appellant's response to his proposed removal, and, therefore, are part of the agency case file. Agency File, Tab B-5-2. The deciding official considered the polygraph results but found them unpersuasive. Agency File, Tab B-1, paragraph 11 at 3.

In addition to requesting Mr. Miller as a witness, the appellant also submitted a letter which represented the results from his second polygraph test. Appeal File, Vol. 1, Tab 9. In this second letter, Mr. Miller found the appellant truthful in his denials of touching Ms. Byars's breast and rubbing Captain Daugherty's buttocks and thigh. The administrative judge declined to admit these results because he did not believe that the projected testimony would be probative of the issues since it was being offered to buttress the appellant's claim of truthfulness, rather than for impeachment, and because he wished to make his own credibility determinations. Tr. I at 4.

Based upon our review of the record, we find that the administrative judge did not abuse his discretion in refusing to admit into evidence the results of the appellant's second polygraph examination. Because of our decision with regard to the adequacy of the administrative judge's credibility determinations, he may, on the remand, reconsider his decision to exclude the results of the second polygraph examination. In the event that he does so, he must also allow the agency the opportunity to rebut the appellant's polygraph evidence.

6. Inherent Improbability.

Inherent improbability relies on the trier of fact's evaluation of the likelihood of the event occurring in the manner described in the testimony. See *Meyer v. United States Customs Service*, 18 M.S.P.R. 545, 546 (1984) (improbable that appellant, a special agent trained in criminal investigations, received government property from the custodian of the property at its storage facility without knowing that it was government property); *Cochran v. Department of Justice, Immigration and Naturalization Service*, 16 M.S.P.R. 343, 348 (1983) (improbable that the witness would run the risk of fabricating a statement when he knew that his memorandum would have to clear two levels of supervision).

7. Demeanor.

Demeanor constitutes the carriage, behavior, manner, and appearance of a witness during testimony. *Dyer v. MacDougal*, 201 F.2d 265, 268-69 (2d. Cir. 1952). Assessment of demeanor depends upon direct observation of the witness during his or her testimony, and, therefore, necessarily depends on demeanor findings made by the administrative judge. See *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982).

The instant case is one in which the credibility determinations made by the administrative judge are crucial to its outcome. To date, the administrative judge has failed to make findings as to whether the incidents

described in the specifications referring to Captain Daugherty and Ms. Schaefer occurred, and failed to provide an adequate basis for his finding that the appellant did not touch Ms. Byars.

The agency, in a proceeding that is based on charges of sexual harassment under 29 C.F.R. § 1604.11(a), is required to meet the same burden of proof as an individual bringing a complaint of sexual harassment under that regulation.

In proposing the appellant's removal, the agency charged that he "sexually harassed female members of this Command." Agency File, Tab B-9. In its decision letter, the agency cited 29 C.F.R. § 1604.11 for the definition of sexual harassment but also referred generally to OPM, Department of Defense, and Department of the Army regulations based upon it. Agency File, Tab B-1, paragraph 8 at 2. The agency also stated that it found the conduct alleged to come "within this definition." *Id.*, paragraph 9 at 3.

In *Downes v. Federal Aviation Administration*, 775 F.2d 288, 295 (Fed. Cir. 1985), the court held an agency that had charged an appellant with sexual harassment to the same standard as an individual or class of complainants who might bring the charge. Yet in *Carosella v. United States Postal Service*, 816 F.2d 638, 642 (Fed. Cir. 1987), issued after the second initial decision now before the Board, the Federal Circuit stated that an agency is not an Equal Employment Opportunity Commission "complainant," when the agency brings a disciplinary action under Chapter 75 for alleged discriminatory conduct. *Carosella* also reasoned

:

that an agency may require "certain workplace behavior in furtherance of the efficiency" of its operations and that it need not stay its hand until an employee has violated Title VII. 816 F.2d at 643. Taken together, *Downes* and *Carosella* establish that an agency must meet Title VII's standards when it has explicitly charged the appellant with violating the law, but not when the agency's action rests on its own valid policy or rule.

It is somewhat ambiguous from the agency's notices whether it was proceeding under the EEOC regulation or its own regulations. Because the agency cited only 29 C.F.R. § 1604.11 in its decision letter, we believe that this appeal must be treated as an action brought under that regulation rather than the agency's own regulations. This seems to be the more reasonable and obvious constructing of the notice. Accordingly, the standard articulated in *Downes* -- that the agency must meet the same requirements as a complainant bringing a charge of sexual harassment under Title VII -- applies in the instant case.

The agency's initial burden is to establish, by the preponderance of the evidence, that the allegedly harassing conduct occurred. See 5 U.S.C. § 7701(c)(1)(B); *Flores v. Department of Labor*, 13 M.S.P.R. 281, 287 (1982). The agency next must establish, again by the preponderance of the evidence, that the conduct was unwelcome to the individual to whom it was directed, that it was of a sexual nature, and that it unreasonably interfered with the

individual's work performance or created an intimidating, hostile, or offensive working environment. See *Carosella v. United States Postal Service*, 30 M.S.P.R. 199, 201 (1986), *aff'd*, 816 F.2d 638 (Fed. Cir. 1987). See also *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983).


The administrative judge must determine, on the existing record, whether the agency would have taken this action against the appellant on the basis of any charges sustained.

In *Berube v. General Services Administration*, No. 86-1584, slip op. at 9 (Fed. Cir. June 2, 1987), the Court of Appeals for the Federal Circuit held that an agency must prove, by a preponderance of the evidence, that it would have imposed the same penalty on the basis of only those charges that were sustained. The court further held that the Board lacked the authority to mitigate a penalty imposed under 5 U.S.C. § 7543. *Id.* at 10. If any charges are sustained, the administrative judge shall determine, on the existing record, whether the preponderance of the evidence shows that the agency would have removed the appellant based solely on those charges sustained.

On remand the administrative judge must resolve the disputed issues of fact with respect to the specifications concerning Captain Daugherty, Ms. Byars, and Ms. Schaefer. The administrative judge must address each incident comprising the specifications, with the exception of those portions of the specification pertaining to Ms. Byars previously not sustained by the Board, state whether he finds that the incident occurred, and explain in detail the

basis for his finding. If the administrative judge finds that an incident has occurred, he must analyze it under the analytical framework established for Title VII sex discrimination claims in *Downes v. Federal Aviation Administration*, 775 F.2d 288 (Fed. Cir. 1985).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.

PUBLIC LAW 115-41—JUNE 23, 2017

DEPARTMENT OF VETERANS AFFAIRS
ACCOUNTABILITY AND WHISTLEBLOWER
PROTECTION ACT OF 2017

Public Law 115–41
115th Congress

An Act

June 23, 2017
[S. 1094]

Department of
Veterans Affairs
Accountability
and
Whistleblower
Protection Act
of 2017.
38 USC 101 note.

To amend title 38, United States Code, to improve the accountability of employees of the Department of Veterans Affairs, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—OFFICE OF ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION

Sec. 101. Establishment of Office of Accountability and Whistleblower Protection.

Sec. 102. Protection of whistleblowers in Department of Veterans Affairs.

Sec. 103. Report on methods used to investigate employees of Department of Veterans Affairs.

TITLE II—ACCOUNTABILITY OF SENIOR EXECUTIVES, SUPERVISORS, AND OTHER EMPLOYEES

Sec. 201. Improved authorities of Secretary of Veterans Affairs to improve accountability of senior executives.

Sec. 202. Improved authorities of Secretary of Veterans Affairs to improve accountability of employees.

Sec. 203. Reduction of benefits for Department of Veterans Affairs employees convicted of certain crimes.

Sec. 204. Authority to recoup bonuses or awards paid to employees of Department of Veterans Affairs.

Sec. 205. Authority to recoup relocation expenses paid to or on behalf of employees of Department of Veterans Affairs.

Sec. 206. Time period for response to notice of adverse actions against supervisory employees who commit prohibited personnel actions.

Sec. 207. Direct hiring authority for medical center directors and VISN directors.

Sec. 208. Time periods for review of adverse actions with respect to certain employees.

Sec. 209. Improvement of training for supervisors.

Sec. 210. Assessment and report on effect on senior executives at Department of Veterans Affairs.

Sec. 211. Measurement of Department of Veterans Affairs disciplinary process outcomes and effectiveness.

TITLE I—OFFICE OF ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION

SEC. 101. ESTABLISHMENT OF OFFICE OF ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION.

(a) IN GENERAL.—Chapter 3 of title 38, United States Code, is amended by adding at the end the following new section:

“§ 323. Office of Accountability and Whistleblower Protection 38 USC 323.

“(a) ESTABLISHMENT.—There is established in the Department an office to be known as the ‘Office of Accountability and Whistleblower Protection’ (in this section referred to as the ‘Office’).

“(b) HEAD OF OFFICE.—(1) The head of the Office shall be responsible for the functions of the Office and shall be appointed by the President pursuant to section 308(a) of this title. President.

“(2) The head of the Office shall be known as the ‘Assistant Secretary for Accountability and Whistleblower Protection’.

“(3) The Assistant Secretary shall report directly to the Secretary on all matters relating to the Office.

“(4) Notwithstanding section 308(b) of this title, the Secretary may only assign to the Assistant Secretary responsibilities relating to the functions of the Office set forth in subsection (c).

“(c) FUNCTIONS.—(1) The functions of the Office are as follows:

“(A) Advising the Secretary on all matters of the Department relating to accountability, including accountability of employees of the Department, retaliation against whistleblowers, and such matters as the Secretary considers similar and affect public trust in the Department.

“(B) Issuing reports and providing recommendations related to the duties described in subparagraph (A).

“(C) Receiving whistleblower disclosures.

“(D) Referring whistleblower disclosures received under subparagraph (C) for investigation to the Office of the Medical Inspector, the Office of Inspector General, or other investigative entity, as appropriate, if the Assistant Secretary has reason to believe the whistleblower disclosure is evidence of a violation of a provision of law, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.

“(E) Receiving and referring disclosures from the Special Counsel for investigation to the Medical Inspector of the Department, the Inspector General of the Department, or such other person with investigatory authority, as the Assistant Secretary considers appropriate.

“(F) Recording, tracking, reviewing, and confirming implementation of recommendations from audits and investigations carried out by the Inspector General of the Department, the Medical Inspector of the Department, the Special Counsel, and the Comptroller General of the United States, including the imposition of disciplinary actions and other corrective actions contained in such recommendations.

“(G) Analyzing data from the Office and the Office of Inspector General telephone hotlines, other whistleblower disclosures, disaggregated by facility and area of health care if appropriate, and relevant audits and investigations to identify

trends and issue reports to the Secretary based on analysis conducted under this subparagraph.

“(H) Receiving, reviewing, and investigating allegations of misconduct, retaliation, or poor performance involving—

“(i) an individual in a senior executive position (as defined in section 713(d) of this title) in the Department;

“(ii) an individual employed in a confidential, policy-making, policy-determining, or policy-advocating position in the Department; or

“(iii) a supervisory employee, if the allegation involves retaliation against an employee for making a whistleblower disclosure.

“(I) Making such recommendations to the Secretary for disciplinary action as the Assistant Secretary considers appropriate after substantiating any allegation of misconduct or poor performance pursuant to an investigation carried out as described in subparagraph (F) or (H).

Communication
and tele-
communications.
Website.

“(2) In carrying out the functions of the Office, the Assistant Secretary shall ensure that the Office maintains a toll-free telephone number and Internet website to receive anonymous whistleblower disclosures.

“(3) In any case in which the Assistant Secretary receives a whistleblower disclosure from an employee of the Department under paragraph (1)(C), the Assistant Secretary may not disclose the identity of the employee without the consent of the employee, except in accordance with the provisions of section 552a of title 5, or as required by any other applicable provision of Federal law.

“(d) STAFF AND RESOURCES.—The Secretary shall ensure that the Assistant Secretary has such staff, resources, and access to information as may be necessary to carry out the functions of the Office.

“(e) RELATION TO OFFICE OF GENERAL COUNSEL.—The Office shall not be established as an element of the Office of the General Counsel and the Assistant Secretary may not report to the General Counsel.

Effective date.
Time period.

“(f) REPORTS.—(1)(A) Not later than June 30 of each calendar year, beginning with June 30, 2017, the Assistant Secretary shall submit to the Committee on Veterans’ Affairs of the Senate and the Committee on Veterans’ Affairs of the House of Representatives a report on the activities of the Office during the calendar year in which the report is submitted.

Recommendations.

“(B) Each report submitted under subparagraph (A) shall include, for the period covered by the report, the following:

Analysis.

“(i) A full and substantive analysis of the activities of the Office, including such statistical information as the Assistant Secretary considers appropriate.

“(ii) Identification of any issues reported to the Secretary under subsection (c)(1)(G), including such data as the Assistant Secretary considers relevant to such issues and any trends the Assistant Secretary may have identified with respect to such issues.

“(iii) Identification of such concerns as the Assistant Secretary may have regarding the size, staffing, and resources of the Office and such recommendations as the Assistant Secretary may have for legislative or administrative action to address such concerns.

“(iv) Such recommendations as the Assistant Secretary may have for legislative or administrative action to improve—

“(I) the process by which concerns are reported to the Office; and

“(II) the protection of whistleblowers within the Department.

“(v) Such other matters as the Assistant Secretary considers appropriate regarding the functions of the Office or other matters relating to the Office.

“(2) If the Secretary receives a recommendation for disciplinary action under subsection (c)(1)(I) and does not take or initiate the recommended disciplinary action before the date that is 60 days after the date on which the Secretary received the recommendation, the Secretary shall submit to the Committee on Veterans’ Affairs of the Senate and the Committee on Veterans’ Affairs of the House of Representatives a detailed justification for not taking or initiating such disciplinary action.

Deadline.
Notification.

“(g) DEFINITIONS.—In this section:

“(1) The term ‘supervisory employee’ means an employee of the Department who is a supervisor as defined in section 7103(a) of title 5.

“(2) The term ‘whistleblower’ means one who makes a whistleblower disclosure.

“(3) The term ‘whistleblower disclosure’ means any disclosure of information by an employee of the Department or individual applying to become an employee of the Department which the employee or individual reasonably believes evidences—

“(A) a violation of a law, rule, or regulation; or

“(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”.

(b) CONFORMING AMENDMENT.—Section 308(b) of such title is amended by adding at the end the following new paragraph:

“(12) The functions set forth in section 323(c) of this title.”.

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 3 of such title is amended by adding at the end the following new item:

38 USC 301 prec.

“323. Office of Accountability and Whistleblower Protection.”.

SEC. 102. PROTECTION OF WHISTLEBLOWERS IN DEPARTMENT OF VETERANS AFFAIRS.

(a) IN GENERAL.—Subchapter II of chapter 7 of title 38, United States Code, is amended by—

(1) striking sections 731, 732, 734, 735, and 736;

(2) by redesignating section 733 as section 731; and

(3) by adding at the end the following new sections:

“§ 732. Protection of whistleblowers as criteria in evaluation of supervisors

38 USC 732.

“(a) DEVELOPMENT AND USE OF CRITERIA REQUIRED.—The Secretary, in consultation with the Assistant Secretary of Accountability and Whistleblower Protection, shall develop criteria that—

Consultation.

“(1) the Secretary shall use as a critical element in any evaluation of the performance of a supervisory employee; and

“(2) promotes the protection of whistleblowers.

“(b) PRINCIPLES FOR PROTECTION OF WHISTLEBLOWERS.—The criteria required by subsection (a) shall include principles for the protection of whistleblowers, such as the degree to which supervisory employees respond constructively when employees of the Department report concerns, take responsible action to resolve such concerns, and foster an environment in which employees of the Department feel comfortable reporting concerns to supervisory employees or to the appropriate authorities.

“(c) SUPERVISORY EMPLOYEE AND WHISTLEBLOWER DEFINED.—In this section, the terms ‘supervisory employee’ and ‘whistleblower’ have the meanings given such terms in section 323 of this title.

38 USC 733.

Time period.
Coordination.

“§ 733. Training regarding whistleblower disclosures

“(a) TRAINING.—Not less frequently than once every two years, the Secretary, in coordination with the Whistleblower Protection Ombudsman designated under section 3(d)(1)(C) of the Inspector General Act of 1978 (5 U.S.C. App.), shall provide to each employee of the Department training regarding whistleblower disclosures, including—

“(1) an explanation of each method established by law in which an employee may file a whistleblower disclosure;

“(2) the right of the employee to petition Congress regarding a whistleblower disclosure in accordance with section 7211 of title 5;

“(3) an explanation that the employee may not be prosecuted or reprised against for disclosing information to Congress, the Inspector General, or another investigatory agency in instances where such disclosure is permitted by law, including under sections 5701, 5705, and 7732 of this title, under section 552a of title 5 (commonly referred to as the Privacy Act), under chapter 93 of title 18, and pursuant to regulations promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191);

“(4) an explanation of the language that is required to be included in all nondisclosure policies, forms, and agreements pursuant to section 115(a)(1) of the Whistleblower Protection Enhancement Act of 2012 (5 U.S.C. 2302 note); and

“(5) the right of contractors to be protected from reprisal for the disclosure of certain information under section 4705 or 4712 of title 41.

“(b) MANNER TRAINING IS PROVIDED.—The Secretary shall ensure, to the maximum extent practicable, that training provided under subsection (a) is provided in person.

Time period.

“(c) CERTIFICATION.—Not less frequently than once every two years, the Secretary shall provide training on merit system protection in a manner that the Special Counsel certifies as being satisfactory.

Web posting.

“(d) PUBLICATION.—The Secretary shall publish on the Internet website of the Department, and display prominently at each facility of the Department, the rights of an employee to make a whistleblower disclosure, including the information described in paragraphs (1) through (5) of subsection (a).

“(e) WHISTLEBLOWER DISCLOSURE DEFINED.—In this section, the term ‘whistleblower disclosure’ has the meaning given such term in section 323 of this title.”.

(b) **CLERICAL AMENDMENTS.**—The table of sections at the beginning of such chapter is amended—

38 USC 701 prec.

(1) by striking the items relating to sections 731 through 736; and

(2) by adding at the end the following new items:

“731. Adverse actions against supervisory employees who commit prohibited personnel actions relating to whistleblower complaints.

“732. Protection of whistleblowers as criteria in evaluation of supervisors.

“733. Training regarding whistleblower disclosures.”.

(c) **CONFORMING AMENDMENTS.**—Section 731 of such title, as redesignated by subsection (a)(2), is amended—

(1) in subsection (c)—

(A) in paragraph (1)—

(i) by striking subparagraphs (A) and (B) and inserting the following:

“(A) making a whistleblower disclosure to the Assistant Secretary for Accountability and Whistleblower Protection, the Inspector General of the Department, the Special Counsel, or Congress;”;

(ii) by redesignating subparagraphs (C) through (F) as subparagraphs (B) through (E), respectively; and

(iii) in subparagraph (B), as redesignated by clause (ii), by striking “complaint in accordance with section 732 or with” and inserting “disclosure made to the Assistant Secretary for Accountability and Whistleblower Protection;”;

(B) in paragraph (2), by striking “through (F)” and inserting “through (E)”;

(2) by adding at the end the following new subsection:

“(d) **WHISTLEBLOWER DISCLOSURE DEFINED.**—In this section, the term ‘whistleblower disclosure’ has the meaning given such term in section 323(g) of this title.”.

SEC. 103. REPORT ON METHODS USED TO INVESTIGATE EMPLOYEES OF DEPARTMENT OF VETERANS AFFAIRS.

(a) **REPORT REQUIRED.**—Not later than 540 days after the date of the enactment of this Act, the Assistant Secretary for Accountability and Whistleblower Protection shall submit to the Secretary of Veterans Affairs, the Committee on Veterans’ Affairs of the Senate, and the Committee on Veterans’ Affairs of the House of Representatives a report on methods used to investigate employees of the Department of Veterans Affairs and whether such methods are used to retaliate against whistleblowers.

(b) **CONTENTS.**—The report required by subsection (a) shall include the following:

(1) An assessment of the use of administrative investigation boards, peer review, searches of medical records, and other methods for investigating employees of the Department.

Assessment.

(2) A determination of whether and to what degree the methods described in paragraph (1) are being used to retaliate against whistleblowers.

Determination.

(3) Recommendations for legislative or administrative action to implement safeguards to prevent the retaliation described in paragraph (2).

Recommendations.

(c) WHISTLEBLOWER DEFINED.—In this section, the term “whistleblower” has the meaning given such term in section 323 of title 38, United States Code, as added by section 101.

TITLE II—ACCOUNTABILITY OF SENIOR EXECUTIVES, SUPERVISORS, AND OTHER EMPLOYEES

SEC. 201. IMPROVED AUTHORITIES OF SECRETARY OF VETERANS AFFAIRS TO IMPROVE ACCOUNTABILITY OF SENIOR EXECUTIVES.

(a) IN GENERAL.—Section 713 of title 38, United States Code, is amended to read as follows:

“§ 713. Senior executives: removal, demotion, or suspension based on performance or misconduct

Determination.	“(a) AUTHORITY.—(1) The Secretary may, as provided in this section, reprimand or suspend, involuntarily reassign, demote, or remove a covered individual from a senior executive position at the Department if the Secretary determines that the misconduct or performance of the covered individual warrants such action. “(2) If the Secretary so removes such an individual, the Secretary may remove the individual from the civil service (as defined in section 2101 of title 5).
Notification.	“(b) RIGHTS AND PROCEDURES.—(1) A covered individual who is the subject of an action under subsection (a) is entitled to— “(A) advance notice of the action and a file containing all evidence in support of the proposed action; “(B) be represented by an attorney or other representative of the covered individual’s choice; and
Consultation.	“(C) grieve the action in accordance with an internal grievance process that the Secretary, in consultation with the Assistant Secretary for Accountability and Whistleblower Protection, shall establish for purposes of this subsection.
Time periods.	“(2)(A) The aggregate period for notice, response, and decision on an action under subsection (a) may not exceed 15 business days. “(B) The period for the response of a covered individual to a notice under paragraph (1)(A) of an action under subsection (a) shall be 7 business days.
Deadline. Notification.	“(C) A decision under this paragraph on an action under subsection (a) shall be issued not later than 15 business days after notice of the action is provided to the covered individual under paragraph (1)(A). The decision shall be in writing, and shall include the specific reasons therefor.
Time period.	“(3) The Secretary shall ensure that the grievance process established under paragraph (1)(C) takes fewer than 21 days. “(4) A decision under paragraph (2) that is not grieved, and a grievance decision under paragraph (3), shall be final and conclusive. “(5) A covered individual adversely affected by a decision under paragraph (2) that is not grieved, or by a grievance decision under paragraph (3), may obtain judicial review of such decision.

“(6) In any case in which judicial review is sought under paragraph (5), the court shall review the record and may set aside any Department action found to be— Courts.
Review.

“(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with a provision of law;

“(B) obtained without procedures required by a provision of law having been followed; or

“(C) unsupported by substantial evidence.

“(c) RELATION TO OTHER PROVISIONS OF LAW.—Section 3592(b)(1) of title 5 and the procedures under section 7543(b) of such title do not apply to an action under subsection (a).

“(d) DEFINITIONS.—In this section:

“(1) The term ‘covered individual’ means—

“(A) a career appointee (as that term is defined in section 3132(a)(4) of title 5); or

“(B) any individual who occupies an administrative or executive position and who was appointed under section 7306(a), section 7401(1), or section 7401(4) of this title.

“(2) The term ‘misconduct’ includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

“(3) The term ‘senior executive position’ means—

“(A) with respect to a career appointee (as that term is defined in section 3132(a) of title 5), a Senior Executive Service position (as such term is defined in such section); and

“(B) with respect to a covered individual appointed under section 7306(a) or section 7401(1) of this title, an administrative or executive position.”.

(b) CONFORMING AMENDMENT.—Section 7461(c)(1) of such title is amended by inserting “employees in senior executive positions (as defined in section 713(d) of this title) and” before “interns”.

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 7 of such title is amended by striking the item relating to section 713 and inserting the following new item: 38 USC 701 prec.

“713. Senior executives: removal, demotion, or suspension based on performance or misconduct.”.

SEC. 202. IMPROVED AUTHORITIES OF SECRETARY OF VETERANS AFFAIRS TO IMPROVE ACCOUNTABILITY OF EMPLOYEES.

(a) IN GENERAL.—Subchapter I of chapter 7 of title 38, United States Code, is amended by inserting after section 713 the following new section:

“§ 714. Employees: removal, demotion, or suspension based on performance or misconduct 38 USC 714.

“(a) IN GENERAL.—(1) The Secretary may remove, demote, or suspend a covered individual who is an employee of the Department if the Secretary determines the performance or misconduct of the covered individual warrants such removal, demotion, or suspension. Determinations.

“(2) If the Secretary so removes, demotes, or suspends such a covered individual, the Secretary may—

“(A) remove the covered individual from the civil service (as defined in section 2101 of title 5);

“(B) demote the covered individual by means of a reduction in grade for which the covered individual is qualified, that

	the Secretary determines is appropriate, and that reduces the annual rate of pay of the covered individual; or “(C) suspend the covered individual.
Effective date.	“(b) PAY OF CERTAIN DEMOTED INDIVIDUALS.—(1) Notwithstanding any other provision of law, any covered individual subject to a demotion under subsection (a)(2) shall, beginning on the date of such demotion, receive the annual rate of pay applicable to such grade. “(2)(A) A covered individual so demoted may not be placed on administrative leave during the period during which an appeal (if any) under this section is ongoing, and may only receive pay if the covered individual reports for duty or is approved to use accrued unused annual, sick, family medical, military, or court leave. “(B) If a covered individual so demoted does not report for duty or receive approval to use accrued unused leave, such covered individual shall not receive pay or other benefits pursuant to subsection (d)(5).
Time periods.	“(c) PROCEDURE.—(1)(A) The aggregate period for notice, response, and final decision in a removal, demotion, or suspension under this section may not exceed 15 business days. “(B) The period for the response of a covered individual to a notice of a proposed removal, demotion, or suspension under this section shall be 7 business days.
Applicability.	“(C) Paragraph (3) of subsection (b) of section 7513 of title 5 shall apply with respect to a removal, demotion, or suspension under this section. “(D) The procedures in this subsection shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures.
Deadline. Notification.	“(2) The Secretary shall issue a final decision with respect to a removal, demotion, or suspension under this section not later than 15 business days after the Secretary provides notice, including a file containing all the evidence in support of the proposed action, to the covered individual of the removal, demotion, or suspension. The decision shall be in writing and shall include the specific reasons therefor. “(3) The procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section.
Time period.	“(4)(A) Subject to subparagraph (B) and subsection (d), any removal or demotion under this section, and any suspension of more than 14 days under this section, may be appealed to the Merit Systems Protection Board, which shall refer such appeal to an administrative judge pursuant to section 7701(b)(1) of title 5.
Deadline.	“(B) An appeal under subparagraph (A) of a removal, demotion, or suspension may only be made if such appeal is made not later than 10 business days after the date of such removal, demotion, or suspension.
Deadline.	“(d) EXPEDITED REVIEW.—(1) Upon receipt of an appeal under subsection (c)(4)(A), the administrative judge shall expedite any such appeal under section 7701(b)(1) of title 5 and, in any such case, shall issue a final and complete decision not later than 180 days after the date of the appeal. “(2)(A) Notwithstanding section 7701(c)(1)(B) of title 5, the administrative judge shall uphold the decision of the Secretary

to remove, demote, or suspend an employee under subsection (a) if the decision is supported by substantial evidence.

“(B) Notwithstanding title 5 or any other provision of law, if the decision of the Secretary is supported by substantial evidence, the administrative judge shall not mitigate the penalty prescribed by the Secretary.

“(3)(A) The decision of the administrative judge under paragraph (1) may be appealed to the Merit Systems Protection Board.

“(B) Notwithstanding section 7701(c)(1)(B) of title 5, the Merit Systems Protection Board shall uphold the decision of the Secretary to remove, demote, or suspend an employee under subsection (a) if the decision is supported by substantial evidence.

“(C) Notwithstanding title 5 or any other provision of law, if the decision of the Secretary is supported by substantial evidence, the Merit Systems Protection Board shall not mitigate the penalty prescribed by the Secretary.

“(4) In any case in which the administrative judge cannot issue a decision in accordance with the 180-day requirement under paragraph (1), the Merit Systems Protection Board shall, not later than 14 business days after the expiration of the 180-day period, submit to the Committee on Veterans’ Affairs of the Senate and the Committee on Veterans’ Affairs of the House of Representatives a report that explains the reasons why a decision was not issued in accordance with such requirement.

Time period.
Deadline.
Reports.

“(5)(A) A decision of the Merit Systems Protection Board under paragraph (3) may be appealed to the United States Court of Appeals for the Federal Circuit pursuant to section 7703 of title 5 or to any court of appeals of competent jurisdiction pursuant to subsection (b)(1)(B) of such section.

“(B) Any decision by such Court shall be in compliance with section 7462(f)(2) of this title.

Compliance.

“(6) The Merit Systems Protection Board may not stay any removal or demotion under this section, except as provided in section 1214(b) of title 5.

“(7) During the period beginning on the date on which a covered individual appeals a removal from the civil service under subsection (c) and ending on the date that the United States Court of Appeals for the Federal Circuit issues a final decision on such appeal, such covered individual may not receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits related to the employment of the individual by the Department.

Time period.

“(8) To the maximum extent practicable, the Secretary shall provide to the Merit Systems Protection Board such information and assistance as may be necessary to ensure an appeal under this subsection is expedited.

“(9) If an employee prevails on appeal under this section, the employee shall be entitled to backpay (as provided in section 5596 of title 5).

“(10) If an employee who is subject to a collective bargaining agreement chooses to grieve an action taken under this section through a grievance procedure provided under the collective bargaining agreement, the timelines and procedures set forth in subsection (c) and this subsection shall apply.

Applicability.

“(e) WHISTLEBLOWER PROTECTION.—(1) In the case of a covered individual seeking corrective action (or on behalf of whom corrective action is sought) from the Office of Special Counsel based on an

alleged prohibited personnel practice described in section 2302(b) of title 5, the Secretary may not remove, demote, or suspend such covered individual under subsection (a) without the approval of the Special Counsel under section 1214(f) of title 5.

Determinations.

“(2) In the case of a covered individual who has made a whistleblower disclosure to the Assistant Secretary for Accountability and Whistleblower Protection, the Secretary may not remove, demote, or suspend such covered individual under subsection (a) until—

“(A) in the case in which the Assistant Secretary determines to refer the whistleblower disclosure under section 323(c)(1)(D) of this title to an office or other investigative entity, a final decision with respect to the whistleblower disclosure has been made by such office or other investigative entity; or

“(B) in the case in which the Assistant Secretary determines not to refer the whistleblower disclosure under such section, the Assistant Secretary makes such determination.

“(f) TERMINATION OF INVESTIGATIONS BY OFFICE OF SPECIAL COUNSEL.—(1) Notwithstanding any other provision of law, the Special Counsel (established by section 1211 of title 5) may terminate an investigation of a prohibited personnel practice alleged by an employee or former employee of the Department after the Special Counsel provides to the employee or former employee a written statement of the reasons for the termination of the investigation.

“(2) Such statement may not be admissible as evidence in any judicial or administrative proceeding without the consent of such employee or former employee.

“(g) VACANCIES.—In the case of a covered individual who is removed or demoted under subsection (a), to the maximum extent feasible, the Secretary shall fill the vacancy arising as a result of such removal or demotion.

“(h) DEFINITIONS.—In this section:

“(1) The term ‘covered individual’ means an individual occupying a position at the Department, but does not include—

“(A) an individual occupying a senior executive position (as defined in section 713(d) of this title);

“(B) an individual appointed pursuant to sections 7306, 7401(1), 7401(4), or 7405 of this title;

“(C) an individual who has not completed a probationary or trial period; or

“(D) a political appointee.

Time period.

“(2) The term ‘suspend’ means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay for a period in excess of 14 days.

“(3) The term ‘grade’ has the meaning given such term in section 7511(a) of title 5.

“(4) The term ‘misconduct’ includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

“(5) The term ‘political appointee’ means an individual who is—

“(A) employed in a position described under sections 5312 through 5316 of title 5 (relating to the Executive Schedule);

“(B) a limited term appointee, limited emergency appointee, or noncareer appointee in the Senior Executive

Service, as defined under paragraphs (5), (6), and (7), respectively, of section 3132(a) of title 5; or

“(C) employed in a position of a confidential or policy-determining character under schedule C of subpart C of part 213 of title 5, Code of Federal Regulations, or successor regulation.

“(6) The term ‘whistleblower disclosure’ has the meaning given such term in section 323(g) of this title.”.

(b) CLERICAL AND CONFORMING AMENDMENTS.—

(1) CLERICAL.—The table of sections at the beginning of chapter 7 of such title is amended by inserting after the item relating to section 713 the following new item:

38 USC 701 prec.

“714. Employees: removal, demotion, or suspension based on performance or misconduct.”.

(2) CONFORMING.—Section 4303(f) of title 5, United States Code, is amended—

(A) in paragraph (2), by striking “or” at the end;

(B) in paragraph (3), by striking the period at the end and inserting “, or”; and

(C) by adding at the end the following:

“(4) any removal or demotion under section 714 of title 38.”.

SEC. 203. REDUCTION OF BENEFITS FOR DEPARTMENT OF VETERANS AFFAIRS EMPLOYEES CONVICTED OF CERTAIN CRIMES.

(a) REDUCTION OF BENEFITS.—

(1) IN GENERAL.—Subchapter I of chapter 7 of title 38, United States Code, is amended by adding at the end the following new section:

“§ 719. Reduction of benefits of employees convicted of certain crimes

38 USC 719.

“(a) REDUCTION OF ANNUITY FOR REMOVED EMPLOYEE.—(1) The Secretary shall order that the covered service of an employee of the Department removed from a position for performance or misconduct under section 713, 714, or 7461 of this title or any other provision of law shall not be taken into account for purposes of calculating an annuity with respect to such individual under chapter 83 or chapter 84 of title 5, if—

Deadlines.

“(A) the Secretary determines that the individual is convicted of a felony (and the conviction is final) that influenced the individual’s performance while employed in the position; and

Determination.

“(B) before such order is made, the individual is afforded—

“(i) notice of the proposed order; and

Notification.

“(ii) an opportunity to respond to the proposed order by not later than ten business days following receipt of such notice; and

“(C) the Secretary issues the order—

“(i) in the case of a proposed order to which an individual responds under subparagraph (B)(ii), not later than five business days after receiving the response of the individual; or

“(ii) in the case of a proposed order to which an individual does not respond, not later than 15 business days after the Secretary provides notice to the individual under subparagraph (B)(i).

	<p>“(2) Any individual with respect to whom an annuity is reduced under this subsection may appeal the reduction to the Director of the Office of Personnel Management pursuant to such regulations as the Director may prescribe for purposes of this subsection.</p>
Deadlines.	<p>“(b) REDUCTION OF ANNUITY FOR RETIRED EMPLOYEE.—(1) The Secretary may order that the covered service of an individual who the Secretary proposes to remove for performance or misconduct under section 713, 714, or 7461 of this title or any other provision of law but who leaves employment at the Department prior to the issuance of a final decision with respect to such action shall not be taken into account for purposes of calculating an annuity with respect to such individual under chapter 83 or chapter 84 of title 5, if—</p>
Determination.	<p>“(A) the Secretary determines that individual is convicted of a felony (and the conviction is final) that influenced the individual’s performance while employed in the position; and</p>
Notification.	<p>“(B) before such order is made, the individual is afforded—</p> <p>“(i) notice of the proposed order;</p> <p>“(ii) opportunity to respond to the proposed order by not later than ten business days following receipt of such notice; and</p> <p>“(C) the Secretary issues the order—</p> <p>“(i) in the case of a proposed order to which an individual responds under subparagraph (B)(ii), not later than five business days after receiving the response of the individual; or</p> <p>“(ii) in the case of a proposed order to which an individual does not respond, not later than 15 business days after the Secretary provides notice to the individual under subparagraph (B)(i).</p>
Time period.	<p>“(2) Upon the issuance of an order by the Secretary under paragraph (1), the individual shall have an opportunity to appeal the order to the Director of the Office of Personnel Management before the date that is seven business days after the date of such issuance.</p> <p>“(3) The Director of the Office of Personnel Management shall make a final decision with respect to an appeal under paragraph (2) within 30 business days of receiving the appeal.</p>
Deadline.	<p>“(c) ADMINISTRATIVE REQUIREMENTS.—Not later than 37 business days after the Secretary issues a final order under subsection (a) or (b) with respect to an individual, the Director of the Office of Personnel Management shall recalculate the annuity of the individual.</p> <p>“(d) LUMP-SUM ANNUITY CREDIT.—Any individual with respect to whom an annuity is reduced under subsection (a) or (b) shall be entitled to be paid so much of such individual’s lump-sum credit as is attributable to the period of covered service.</p>
Consultation. Regulations.	<p>“(e) SPOUSE OR CHILDREN EXCEPTION.—(1) The Secretary, in consultation with the Director of the Office of Personnel Management, shall prescribe regulations that may provide for the payment to the spouse or children of any individual referred to in subsection (a) or (b) of any amounts which (but for this subsection) would otherwise have been nonpayable by reason of such subsections.</p> <p>“(2) Regulations prescribed under paragraph (1) shall be consistent with the requirements of section 8332(o)(5) and 8411(l)(5) of title 5, as the case may be.</p> <p>“(f) DEFINITIONS.—In this section:</p>

“(1) The term ‘covered service’ means, with respect to an individual subject to a removal for performance or misconduct under section 719 or 7461 of this title or any other provision of law, the period of service beginning on the date that the Secretary determines under such applicable provision that the individual engaged in activity that gave rise to such action and ending on the date that the individual is removed from or leaves a position of employment at the Department prior to the issuance of a final decision with respect to such action.

Time period.
Determination.

“(2) The term ‘lump-sum credit’ has the meaning given such term in section 8331(8) or section 8401(19) of title 5, as the case may be.

“(3) The term ‘service’ has the meaning given such term in section 8331(12) or section 8401(26) of title 5, as the case may be.”.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 7 of such title is amended by inserting after the item relating to section 717 the following new item:

38 USC 701 prec.

“719. Reduction of benefits of employees convicted of certain crimes.”.

(b) APPLICATION.—Section 719 of title 38, United States Code, as added by subsection (a)(1), shall apply to any action of removal of an employee of the Department of Veterans Affairs under section 719 or 7461 of such title or any other provision of law, commencing on or after the date of the enactment of this Act.

38 USC 719 note.

SEC. 204. AUTHORITY TO RECOUP BONUSES OR AWARDS PAID TO EMPLOYEES OF DEPARTMENT OF VETERANS AFFAIRS.

(a) IN GENERAL.—Subchapter I of chapter 7 of title 38, United States Code, as amended by section 203, is further amended by adding at the end the following new section:

“§ 721. Recoupment of bonuses or awards paid to employees of Department

38 USC 721.

“(a) IN GENERAL.—Notwithstanding any other provision of law, the Secretary may issue an order directing an employee of the Department to repay the amount, or a portion of the amount, of any award or bonus paid to the employee under title 5, including under chapters 45 or 53 of such title, or this title if—

Deadlines.

“(1) the Secretary determines that the individual engaged in misconduct or poor performance prior to payment of the award or bonus, and that such award or bonus would not have been paid, in whole or in part, had the misconduct or poor performance been known prior to payment; and

Determination.

“(2) before such repayment, the employee is afforded—

“(A) notice of the proposed order; and

Notification.

“(B) an opportunity to respond to the proposed order by not later than 10 business days after the receipt of such notice; and

“(3) the Secretary issues the order—

“(A) in the case of a proposed order to which an individual responds under paragraph (2)(B), not later than five business days after receiving the response of the individual; or

“(B) in the case of a proposed order to which an individual does not respond, not later than 15 business days

	after the Secretary provides notice to the individual under paragraph (2)(A).
Time period.	“(b) APPEAL OF ORDER OF SECRETARY.—(1) Upon the issuance of an order by the Secretary under subsection (a) with respect to an individual, the individual shall have an opportunity to appeal the order to the Director of the Office of Personnel Management before the date that is seven business days after the date of such issuance.
Deadline.	“(2) The Director shall make a final decision with respect to an appeal under paragraph (1) within 30 business days after receiving such appeal.”
38 USC 701 prec.	(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter, as amended by section 203(a)(2), is further amended by inserting after the item relating to section 719 the following new item:
	“721. Recoupment of bonuses or awards paid to employees of Department.”
Applicability. 38 USC 721 note.	(c) EFFECTIVE DATE.—Section 721 of title 38, United States Code, as added by subsection (a), shall apply with respect to an award or bonus paid by the Secretary of Veterans Affairs to an employee of the Department of Veterans Affairs on or after the date of the enactment of this Act.
38 USC 713 note.	(d) CONSTRUCTION.—Nothing in this Act or the amendments made by this Act may be construed to modify the certification issued by the Office of Personnel Management and the Office of Management and Budget regarding the performance appraisal system of the Senior Executive Service of the Department of Veterans Affairs.
	SEC. 205. AUTHORITY TO RECOUP RELOCATION EXPENSES PAID TO OR ON BEHALF OF EMPLOYEES OF DEPARTMENT OF VETERANS AFFAIRS.
	(a) IN GENERAL.—Subchapter I of chapter 7 of title 38, United States Code, as amended by section 204, is further amended by adding at the end the following new section:
38 USC 723.	“§ 723. Recoupment of relocation expenses paid on behalf of employees of Department
	“(a) IN GENERAL.—Notwithstanding any other provision of law, the Secretary may issue an order directing an employee of the Department to repay the amount, or a portion of the amount, paid to or on behalf of the employee under title 5 for relocation expenses, including any expenses under section 5724 or 5724a of such title, or this title if—
Determination.	“(1) the Secretary determines that relocation expenses were paid following an act of fraud or malfeasance that influenced the authorization of the relocation expenses;
Notification.	“(2) before such repayment, the employee is afforded—
	“(A) notice of the proposed order; and
	“(B) an opportunity to respond to the proposed order not later than ten business days following the receipt of such notice; and
	“(3) the Secretary issues the order—
	“(A) in the case of a proposed order to which an individual responds under paragraph (2)(B), not later than five business days after receiving the response of the individual; or

“(B) in the case of a proposed order to which an individual does not respond, not later than 15 business days after the Secretary provides notice to the individual under paragraph (2)(A).

“(b) APPEAL OF ORDER OF SECRETARY.—(1) Upon the issuance of an order by the Secretary under subsection (a) with respect to an individual, the individual shall have an opportunity to appeal the order to the Director of the Office of Personnel Management before the date that is seven business days after the date of such issuance. Time period.

“(2) The Director shall make a final decision with respect to an appeal under paragraph (1) within 30 days after receiving such appeal.” Deadline.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is further amended by inserting after the item relating to section 721, as added by section 204(b), the following new item: 38 USC 701 prec.

“723. Recoupment of relocation expenses paid on behalf of employees of Department.”.

(c) EFFECTIVE DATE.—Section 723 of title 38, United States Code, as added by subsection (a), shall apply with respect to an amount paid by the Secretary of Veterans Affairs to or on behalf of an employee of the Department of Veterans Affairs for relocation expenses on or after the date of the enactment of this Act. Applicability.
38 USC 723 note.

SEC. 206. TIME PERIOD FOR RESPONSE TO NOTICE OF ADVERSE ACTIONS AGAINST SUPERVISORY EMPLOYEES WHO COMMIT PROHIBITED PERSONNEL ACTIONS.

Section 731(a)(2)(B) of title 38, United States Code, as redesignated by section 102(a)(2), is amended—

(1) in clause (i), by striking “14 days” and inserting “10 days”; and

(2) in clause (ii), by striking “14-day period” and inserting “10-day period”.

SEC. 207. DIRECT HIRING AUTHORITY FOR MEDICAL CENTER DIRECTORS AND VISN DIRECTORS.

(a) IN GENERAL.—Section 7401 of title 38, United States Code, is amended by adding at the end the following new paragraph:

“(4) Directors of medical centers and directors of Veterans Integrated Service Networks with demonstrated ability in the medical profession, in health care administration, or in health care fiscal management.”.

(b) CONFORMING AMENDMENTS.—Section 7404(a)(1) of such title is amended—

(1) by inserting “(A)” before “The annual”; and

(2) in subparagraph (A), as designated by paragraph (1)—

(A) by inserting “and 7401(4)” after “7306”; and

(B) by adding at the end the following new subparagraph:

“(B) Section 5377 of title 5 shall apply to a position under section 7401(4) of this title as if such position were included in the definition of ‘position’ in section 5377(a) of title 5.”. Applicability.

SEC. 208. TIME PERIODS FOR REVIEW OF ADVERSE ACTIONS WITH RESPECT TO CERTAIN EMPLOYEES.

(a) PHYSICIANS, DENTISTS, PODIATRISTS, CHIROPRACTORS, OPTOMETRISTS, REGISTERED NURSES, PHYSICIAN ASSISTANTS, AND EXPANDED-FUNCTION DENTAL AUXILIARIES.—Paragraph (2) of section 7461(b) of title 38, United States Code, is amended to read as follows:

Appeal.

“(2) In any case other than a case described in paragraph (1) that involves or includes a question of professional conduct or competence in which a major adverse action was not taken, such an appeal shall be made through Department grievance procedures under section 7463 of this title.”.

(b) MAJOR ADVERSE ACTIONS INVOLVING PROFESSIONAL CONDUCT OR COMPETENCE.—Section 7462(b) of such title is amended—

(1) in paragraph (1)—

(A) in the matter preceding subparagraph (A), by inserting “, within the aggregate time period specified in paragraph (5)(A),” after “is entitled”;

(B) in subparagraph (A)—

(i) by striking “At least 30 days advance written notice” and inserting “Advance written notice”;

(ii) by striking “and a statement” and inserting “a statement”; and

(iii) by inserting “and a file containing all the evidence in support of each charge,” after “with respect to each charge,”; and

(C) in subparagraph (B), by striking “A reasonable time, but not less than seven days” and inserting “The opportunity, within the time period provided for in paragraph (4)(A)”;

(2) by striking paragraph (3) and inserting the following new paragraph (3):

“(3) After considering the employee’s answer, if any, and within the time period provided for in paragraph (5)(B), the deciding official shall render a decision on the charges. The decision shall be in writing and shall include the specific reasons therefor.”;

(3) in paragraph (4)—

(A) by striking subparagraph (A) and inserting the following new subparagraph (A):

“(A) The period for the response of an employee under paragraph (1)(B) to advance written under paragraph (1)(A) shall be seven business days.”; and

(B) in subparagraph (B), by striking “30 days” and inserting “seven business days”; and

(4) by adding at the end the following new paragraphs:

“(5)(A) The aggregate period for the resolution of charges against an employee under this subsection may not exceed 15 business days.

“(B) The deciding official shall render a decision under paragraph (3) on charges under this subsection not later than 15 business days after the Under Secretary provides notice on the charges for purposes of paragraph (1)(A).

“(6) The procedures in this subsection shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures.”.

(c) OTHER ADVERSE ACTIONS.—Section 7463(c) of such title is amended—

Deadline.
Notification.

(1) in paragraph (1), by striking “the same notice and opportunity to answer with respect to those charges as provided in subparagraphs (A) and (B) of section 7462(b)(1) of this title” and inserting “notice and an opportunity to answer with respect to those charges in accordance with subparagraphs (A) and (B) of section 7462(b)(1) of this title, but within the time periods specified in paragraph (3)”;

(2) in paragraph (2)—

(A) in the matter preceding subparagraph (A), by inserting “, within the aggregate time period specified in paragraph (3)(A),” after “is entitled”;

(B) in subparagraph (A), by striking “an advance written notice” and inserting “written notice”; and

(C) in subparagraph (B), by striking “a reasonable time” and inserting “time to answer”; and

(3) by adding at the end the following new paragraph

(3):

“(3)(A) The aggregate period for the resolution of charges against an employee under paragraph (1) or (2) may not exceed 15 business days.

“(B) The period for the response of an employee under paragraph (1) or (2)(B) to written notice of charges under paragraph (1) or (2)(A), as applicable, shall be seven business days.

“(C) The deciding official shall render a decision on charges under paragraph (1) or (2) not later than 15 business days after notice is provided on the charges for purposes of paragraph (1) or (2)(A), as applicable.”.

Deadline.

SEC. 209. IMPROVEMENT OF TRAINING FOR SUPERVISORS.

38 USC 735 note.

(a) IN GENERAL.—The Secretary of Veterans Affairs shall provide to each employee of the Department of Veterans Affairs who is employed as a supervisor periodic training on the following:

(1) The rights of whistleblowers and how to address a report by an employee of a hostile work environment, reprisal, or harassment.

(2) How to effectively motivate, manage, and reward the employees who report to the supervisor.

(3) How to effectively manage employees who are performing at an unacceptable level and access assistance from the human resources office of the Department and the Office of the General Counsel of the Department with respect to those employees.

(b) DEFINITIONS.—In this section:

(1) SUPERVISOR.—The term “supervisor” has the meaning given such term in section 7103(a) of title 5, United States Code.

(2) WHISTLEBLOWER.—The term “whistleblower” has the meaning given such term in section 323(g) of title 38, United States Code, as added by section 101.

SEC. 210. ASSESSMENT AND REPORT ON EFFECT ON SENIOR EXECUTIVES AT DEPARTMENT OF VETERANS AFFAIRS.

(a) IN GENERAL.—Not later than two years after the date of the enactment of this Act, the Secretary of Veterans Affairs shall—

(1) measure and assess the effect of the enactment of this title on the morale, engagement, hiring, promotion, retention, discipline, and productivity of individuals in senior executive positions at the Department of Veterans Affairs; and

(2) submit to the Committee on Veterans' Affairs of the Senate and the Committee on Veterans' Affairs of the House of Representatives a report on the findings of the Secretary with respect to the measurement and assessment carried out under paragraph (1).

(b) ELEMENTS.—The assessment required by subsection (a)(1) shall include the following:

(1) With respect to engagement, trends in morale of individuals in senior executive positions and individuals aspiring to senior executive positions.

(2) With respect to promotions—

(A) whether the Department is experiencing an increase or decrease in the number of employees participating in leadership development and candidate development programs with the intention of becoming candidates for senior executive positions; and

(B) trends in applications to senior executive positions within the Department.

(3) With respect to retention—

(A) trends in retirement rates of individuals in senior executive positions at the Department;

(B) trends in quit rates of individuals in senior executive positions at the Department;

(C) rates of transfer of—

(i) individuals from other Federal agencies into senior executive positions at the Department; and

(ii) individuals from senior executive positions at the Department to other Federal agencies; and

(D) trends in total loss rates by job function.

(4) With respect to disciplinary processes—

(A) regarding individuals in senior executive positions at the Department who are the subject of disciplinary action—

(i) the length of the disciplinary process in days for such individuals both before the date of the enactment of this Act and under the provisions of this Act described in subsection (a)(1); and

(ii) the extent to which appeals by such individuals are upheld under such provisions as compared to before the date of the enactment of this Act;

(B) the components or offices of the Department which experience the greatest number of proposed adverse actions against individuals in senior executive positions and components and offices which experience the least relative to the size of the components or offices' total number of senior executive positions;

(C) the tenure of individuals in senior executive positions who are the subject of disciplinary action;

(D) whether the individuals in senior executive positions who are the subject of disciplinary action have previously been disciplined; and

(E) the number of instances of disciplinary action taken by the Secretary against individuals in senior executive positions at the Department as compared to government-wide discipline against individuals in Senior Executive Service positions (as defined in section 3132(a) of title 5, United States Code) as a percentage of the total number

of individuals in senior executive positions at the Department and Senior Executive Service positions (as so defined).

(5) With respect to hiring—

(A) the degree to which the skills of newly hired individuals in senior executive positions at the Department are appropriate with respect to the needs of the Department;

(B) the types of senior executive positions at the Department most commonly filled under the authorities in the provisions described in subsection (a)(1);

(C) the number of senior executive positions at the Department filled by hires outside of the Department compared to hires from within the Department;

(D) the length of time to fill a senior executive position at the Department and for a new hire to begin working in a new senior executive position;

(E) the mission-critical deficiencies filled by newly hired individuals in senior executive positions and the connection between mission-critical deficiencies filled under the provisions described in subsection (a) and annual performance of the Department;

(F) the satisfaction of applicants for senior executive positions at the Department with the hiring process, including the clarity of job announcements, reasons for withdrawal of applications, communication regarding status of applications, and timeliness of hiring decision; and

(G) the satisfaction of newly hired individuals in senior executive positions at the Department with the hiring process and the process of joining and becoming oriented with the Department.

(c) SENIOR EXECUTIVE POSITION DEFINED.—In this section, the term “senior executive position” has the meaning given such term in section 713 of title 38, United States Code.

**SEC. 211. MEASUREMENT OF DEPARTMENT OF VETERANS AFFAIRS
DISCIPLINARY PROCESS OUTCOMES AND EFFECTIVENESS.**

(a) MEASURING AND COLLECTING.—

(1) IN GENERAL.—The Secretary of Veterans Affairs shall measure and collect information on the outcomes of disciplinary actions carried out by the Department of Veterans Affairs during the three-year period ending on the date of the enactment of this Act and the effectiveness of such actions. Time period.

(2) ELEMENTS.—In measuring and collecting pursuant to paragraph (1), the Secretary shall measure and collect information regarding the following:

(A) The average time from the initiation of an adverse action against an employee at the Department to the final resolution of that action.

(B) The number of distinct steps and levels of review within the Department involved in the disciplinary process and the average length of time required to complete these steps.

(C) The rate of use of alternate disciplinary procedures compared to traditional disciplinary procedures and the frequency with which employees who are subject to alternative disciplinary procedures commit additional offenses.

(D) The number of appeals from adverse actions filed against employees of the Department, the number of appeals upheld, and the reasons for which the appeals were upheld.

(E) The use of paid administrative leave during the disciplinary process and the length of such leave.

(b) REPORT.—

(1) IN GENERAL.—Not later than December 31, 2017, the Secretary shall submit to the appropriate committees of Congress a report on the disciplinary procedures and actions of the Department.

(2) CONTENTS.—The report submitted under paragraph (1) shall include the following:

(A) The information collected under subsection (a).

(B) The findings of the Secretary with respect to the measurement and collection carried out under subsection (a).

Analysis.

(C) An analysis of the disciplinary procedures and actions of the Department.

(D) Suggestions for improving the disciplinary procedures and actions of the Department.

(E) Such other matters as the Secretary considers appropriate.

Definition.

(3) APPROPRIATE COMMITTEES OF CONGRESS.—In this subsection, the term “appropriate committees of Congress” means—

(A) the Committee on Appropriations and the Committee on Veterans’ Affairs of the Senate; and

(B) the Committee on Appropriations and the Committee on Veterans’ Affairs of the House of Representatives.

Approved June 23, 2017.

LEGISLATIVE HISTORY—S. 1094:

CONGRESSIONAL RECORD, Vol. 163 (2017):

June 6, considered and passed Senate.

June 13, considered and passed House.

DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS (2017):

June 23, Presidential remarks.





Department of Veterans Affairs Whistleblower Rights and Protection & Prohibited Personnel Practices

MANAGERS AND SUPERVISORS
ROLES AND RESPONSIBILITIES

*ADAPTED FROM
MATERIALS PREPARED BY
THE U.S. OFFICE OF
SPECIAL COUNSEL (OSC)*

Learning Objectives

After reviewing this training you will be able to:

1. Explain why Merit Systems Principles, Prohibited Personnel Practices, and whistleblower disclosures are important to the Department of Veterans Affairs (VA).
2. Recognize the nine Merit Systems Principles and thirteen Prohibited Personnel Practices.
3. Distinguish between a protected disclosure and whistleblower retaliation complaint.
4. Explain the process for making a protected disclosure and filing a whistleblower retaliation complaint.
5. Explain the roles and responsibilities of the Merit Systems Protection Board (MSPB), the Office of Special Counsel (OSC), and the Equal Employment Opportunity Commission (EEOC).
6. Summarize your roles and responsibilities in proactively preventing Prohibited Personnel Practices and whistleblower retaliation.
7. Summarize the avenues of redress and resources available to VA employees for addressing whistleblower retaliation and making whistleblower disclosures.

Merit System Principles



Merit System Principles

- Merit System Principles are the core corporate values that guide the Federal Human Capital Management System and provide the foundational underpinnings directing how we manage and lead our employees.

These nine Merit System Principles provide guidance on how managers and supervisors should manage our workforce, how human resources staff should provide advisory and consulting services, and what should be at the core of every human resources decision.

Merit System Principles are part of the Civil Service Reform Act of 1978, and can be found at 5 U.S.C. § 2301(b).

Merit System Principles

9/4/2019

1. Recruit, select, and advance on merit after fair and open competition.
2. Treat employees and applicants fairly and equitably.
3. Provide equal pay for equal work and reward excellent performance.
4. Maintain high standards of integrity, conduct, and concern for the public interest.
5. Manage employees efficiently and effectively.
6. Retain or separate employees on the basis of their performance.
7. Educate and train employees when it will result in better organizational or individual performance.
8. Protect employees from improper political influence.
9. Protect employees against reprisal for the lawful disclosure of information in "whistleblower" situations.

Prohibited Personnel Practices



Prohibited Personnel Practices (PPP)



9/4/2019

Prohibited Personnel Practices (PPP) are actions that a Federal employee with personnel action authority MAY NOT TAKE. A Federal employee has personnel action authority if they can:

- (a) take;
- (b) direct others to take;
- (c) recommend; or
- (d) approve any personnel action.

People with personnel action authority – *managers and supervisors* – are charged with avoiding Prohibited Personnel Practices.

Committing a PPP is cause for disciplinary action (e.g., suspension, demotion, removal, debarment from Federal employment).

Managers and supervisors must take corrective action and provide relief (e.g., restoring the employee back to his or her position) to employees who are victims of PPPs.

Thirteen Prohibited Personnel Practices (PPP) are defined by law at 5 U.S.C. § 2302(b).

Prohibited Personnel Practices (PPP)



9/4/2019

1. Discriminate for or against any employee/applicant.
2. Solicit or consider improper employment recommendations.
3. Coerce an employee's political activity.
4. Deceive or willfully obstruct a person's right to compete for employment.
5. Influence any person to withdraw from competition for a position.
6. Give unauthorized preference or improper advantage.
7. Employ, promote, or provide an employment benefit to a relative.
8. Retaliate against a whistleblower, whether an employee or applicant.
9. Retaliate against employees or applicants for exercising their lawful rights.
10. Unlawfully discriminate for conduct unrelated to work performance.
11. Knowingly violate veterans' preference requirements.
12. Violate any law, rule, or regulation which implements or directly concerns the merit principles.
13. Implement or enforce a nondisclosure agreement or policy lacking notification of whistleblower rights.

PPP 1 - Discrimination



9/4/2019

A Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may *not*:

discriminate for or against an employee or applicant based on race, color, religion, sex (including pregnancy and gender identity), national origin, age, handicapping condition, genetic information, marital status, or political affiliation.

EXAMPLE: Susan is married to Louis. One evening, Louis comes by to pick up Susan from work. Joe, Susan's supervisor, meets Louis in the parking lot and finds that Louis is loud and obnoxious. Joe, concerned with Susan's judgment in her choice of partner, reassigns Susan to a different position at the same pay. **Joe has committed a PPP.**

PPP 2 - Improper employment recommendations



9/4/2019

A Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may *not*:

solicit or consider employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics.

EXAMPLE: The Selecting Official hires Francis based on Senator Smith's recommendation. Senator Smith provides Francis a recommendation based only on the fact that Francis is a constituent of Senator Smith. **The selecting official has committed a PPP.**

PPP 3 - Coerce political activity



9/4/2019

A Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may *not*:

coerce the political activity of any person.

EXAMPLE: The Shift Supervisor takes away significant job duties and responsibilities from Marley because Marley will not make a contribution to the Shift Supervisor's favorite candidate. **The Shift Supervisor has committed a PPP.**

PPP 4 - Obstruct competition for employment



9/4/2019

A Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may *not*:

deceive or willfully obstruct anyone from competing for employment

EXAMPLE: Ariel, a Supervisor located at the Network Support Office, directs that no vacancy announcements be released to the Network Budget Office where Alex works because Ariel does not want Alex to get a new job. **Ariel has committed a PPP.**

PPP 5 - Influence withdrawal from competition



9/4/2019

A Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may *not*:

influence anyone to withdraw from competition for any position so as to improve or injure the employment prospects of any other person.

EXAMPLE: Gina is hiring a management analyst for a position that does not require travel. Scott applies for the position and is interviewed. Gina knows that Scott does not like to travel. Even though the position does not require travel, Gina tells Scott in the interview that he would be traveling 80% of the time if he is selected for this position. Scott is unhappy with the travel but does not withdraw from the competition.

Gina has committed a PPP.

PPP 6 - Unauthorized preference or advantage



9/4/2019

A Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may *not*:

give an unauthorized preference or advantage to anyone so as to improve or injure the employment prospects of any particular employee or applicant.

EXAMPLE: Olivia wants to select her friend Ralph for a program analyst position in her office located in Miami. Olivia is worried that too many qualified candidates will apply for the position in Miami, which may prevent her selection of Ralph. Consequently, Olivia announces the vacancy in Tampa. Ralph, who lives in Miami, applies and is selected for the position in Tampa. As soon as Ralph is selected, the position is reassigned to Miami. **Olivia has committed a PPP.**

PPP 7 - Nepotism



9/4/2019

A Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may *not*:

engage in nepotism (i.e., hire, promote, provide an employment benefit, or advocate for the hiring, promotion, or provision of employment benefits to relatives).

EXAMPLE: The Supply Manager asks the Supply Supervisor overseeing the evening shift to hire his stepson. **The Supply manager has committed a PPP.**

PPP 8 – Retaliate against a whistleblower



9/4/2019

A Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may *not*:

- (a) take;
- (b) fail to take;
- (c) threaten to take; or
- (d) threaten to fail to take

a personnel action against an employee or applicant for disclosing information which the employee or applicant reasonably believes evidences:

- (a) a violation of any law, rule or regulation;
- (b) gross mismanagement;
- (c) a gross waste of funds;
- (d) an abuse of authority;
- (e) a substantial and specific danger to public health or safety; or
- (f) censorship related to scientific research, analysis, or technical information.

More information about whistleblower retaliation can be found later in this training.

EXAMPLE: The Cemetery Director informs her staff that she will reassign any employee for reporting problems at the Cemetery to Senator Martin. **The Cemetery Director has committed a PPP.**

PPP 9 - Retaliation for exercising lawful rights



9/4/2019

A Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may *not*:

- (a) take;
- (b) fail to take;
- (c) threaten to take; or
- (d) threaten to fail to take

a personnel action against an employee or applicant for:

- (a) exercising an appeal, complaint, or grievance right of the employee, regardless of whether such an appeal, complaint or grievance right pertains to whistleblower retaliation;
- (b) testifying for or assisting another in exercising such a right;
- (c) cooperating with or disclosing information to the Inspector General or the Special Counsel; or
- (d) refusing to obey an order that would require the individual to violate a law.

EXAMPLE: Dr. Shah is Dr. Neal's second-level supervisor. Dr. Neal is researching the causes of Veteran suicide for the VA. Dr. Shah learns that Dr. Neal filed a complaint with VA's Office of Inspector General (VAOIG). A few days later, Dr. Shah contacts Dr. Martinez, Dr. Neal's supervisor, and informs her of Dr. Neal's complaint to VAOIG. Dr. Shah and Dr. Martinez both agree that they cannot trust Dr. Neal because he went to VAOIG. On the same day, Dr. Martinez emails Dr. Shah to inform him that Dr. Neal often seems depressed and for that reason she believes that Dr. Neal should not lead the research project. Dr. Shah sends an email agreeing with Dr. Martinez's decision. Dr. Neal is removed from the research project and transferred to a new research project. **Dr. Shah and Dr. Martinez have both committed a PPP.**

PPP 10 – Discrimination for conduct unrelated to work performance



9/4/2019

A Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may *not*:

discriminate on the basis of conduct unrelated to work performance.

EXAMPLE: The Associate Director refuses to promote Stevie because Stevie is a outspoken member of the Tea Party and attends Tea Party events on the weekends. **The Associate Director has committed a PPP.**

PPP 11 – Knowingly violate veterans' preference requirements



9/4/2019

A Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may *not*:

- (a) knowingly take or fail to take;
- (b) recommend; or
- (c) approve a personnel action

if the taking or failure to take such action would violate a veterans' preference requirement.

EXAMPLE: The OI&T Supervisor learns the candidate she wants to hire is being blocked by several candidates ranked high on the certificate because of veterans' preference. The OI&T Supervisor cancels the vacancy announcement to avoid selecting candidates with veterans' preference. **The OI&T Supervisor committed a PPP.**

PPP 12 - Violate any Law, Rule, or Regulation



9/4/2019

A Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may *not*:

take or fail to take a personnel action, if taking or failing to take action would violate any law, rule or regulation implementing or directly concerning merit system principles at 5 U.S.C. §2301.

EXAMPLE: Dr. Marcos, a prominent VA physician, writes a letter to the editor of a local newspaper criticizing the affirmative action plan at her medical center and its impact on patient care. Dr. Marcos does not sign the letter using her job title and she indicates in the letter that her views represent her personal opinion. Malik, the Medical Center Director, terminates Dr. Marcos' appointment because he believes Dr. Marcos' letter is unfairly critical of the medical center. **Malik has committed a PPP because he took a personnel action (termination) in violation of a law (first amendment right to free speech on a matter of public concern) that implements a merit system principle (treat employees and applicants fairly and equitably) .**

PPP 13 – Nondisclosure agreements without certain language



9/4/2019

A Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may *not*:

implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement:
"These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."

Knowledge Check

Directions: Match the letters in Column B with the descriptions in Column A. Answers in Column B may be used for more than one description in Column A or not at all.

Column A

Column B

- | | |
|--|-----------------------------------|
| 1. The OI&T Director tells all employees in her program that they should never go to the Inspector General or the Office of Special Counsel to complain about her program. | A. Core Values |
| 2. The Cemetery Director does not hire Jane based on Senator Smith's recommendation. | B. Executive Core Qualifications |
| 3. Chris' Supervisor takes away key job duties because he will not make a donation to his Supervisor's favorite political candidate. | C. Merit System Principles |
| 4. Jill is not selected for training because she reported a party that she thought was a waste of Government funds to the Inspector General. | D. Prohibited Personnel Practices |
| 5. A recruiter participates in career fairs targeting minorities, women, and persons with disabilities to diversify the applicant pipeline. | |
| 6. The Chief of Staff awards annual performance bonuses solely on merit-based rationale. | |
| 7. Associate Facility Director does not give Jennifer, an eligible Veteran, preference over other applicants on the Certificate of Eligibility, although she qualifies for it. | |
| 8. Joe tells a manager to select Joe's son over other better qualified applicants. | |
| 9. Nursing Director tells Jack not to apply for the ER Department Chief Nurse position because he is not qualified, although Jack is qualified for the position. | |
| 10. VISN Director refuses to promote the IT Manager because she is a single mother. | |

Knowledge Check - Answers

Directions: Match the letters in Column B with the descriptions in Column A. Answers in Column B may be used for more than one description in Column A or not at all.

Column A

Column B

- | | |
|---|---|
| <p>D 1. The OI&T Director tells all employees in her program that they should never go to the Inspector General or the Office of Special Counsel to complain about her program.</p> <hr/> <p>D 2. The Cemetery Director does not hire Jane based on Senator Smith's recommendation.</p> <hr/> <p>D 3. Chris' Supervisor takes away key job duties because he will not make a donation to his Supervisor's favorite political candidate.</p> <hr/> <p>D 4. Jill is not selected for training because she reported a gross waste of funds to VAOIG.</p> <hr/> <p>C 5. A recruiter participates in career fairs targeting minorities, women, and persons with disabilities to diversify the applicant pipeline.</p> <hr/> <p>C 6. The Chief of Staff awards annual performance bonuses solely on merit-based rationale.</p> <hr/> <p>D 7. Associate Facility Director does not give Jennifer, an eligible Veteran, preference over other applicants on the Certificate of Eligibility, although she qualifies for it.</p> <hr/> <p>D 8. Joe tells a manager to select Joe's son over other better qualified applicants.</p> <hr/> <p>D 9. Nursing Director tells Jack not to apply for the ER Department Chief Nurse position because he is not qualified, although Jack is qualified for the position.</p> <hr/> <p>D 10. VISN Director refuses to promote the IT Manager because she is a single mother.</p> | <p>A. Core Values</p>
<p>B. Executive Core Qualifications</p>
<p>C. Merit System Principles</p>
<p>D. Prohibited Personnel Practices</p> |
|---|---|

Whistleblower Retaliation and Protected Disclosures



Whistleblower retaliation and protected disclosures



9/4/2019

Whistleblower disclosures are crucial in helping to expose fraud, waste, abuse, mismanagement, and threats or harm to public health and safety across the Federal government.

Whistleblowers disclosures save billions of dollars and even human lives.

Retaliating against a whistleblower is a Prohibited Personnel Practice (PPP).

Whistleblower retaliation is cause for disciplinary action (e.g., suspension, demotion, removal, debarment from Federal employment).

Victims of whistleblower retaliation are also entitled to corrective action and relief (e.g., restoring the employee back to his or her position).

Protected disclosures



9/4/2019

■ **Protected disclosures** are defined as disclosing information which the whistleblower reasonably believes evidences:

1. a violation of law, rule, or regulation;
2. gross mismanagement;
3. gross waste of funds;
4. an abuse of authority;
5. a substantial and specific danger to public health or safety; or
6. Censorship related to scientific research, analysis or technical information.

■ Determining what is a **protected disclosure**:

- The information disclosed does not have to be accurate to be protected.
- No requirement that a whistleblower go through his or her chain of command.
- Whistleblower's personal motivation does not negate reasonable belief.
- Employee or applicant is protected if an employer mistakenly believes the employee or applicant is a whistleblower.

Whistleblower retaliation



9/4/2019

■ **Whistleblower Retaliation:** A Federal employee authorized to take, direct others to take, recommend or approve any personnel action **MAY NOT** take, fail to take, or threaten to take any **personnel action** against an employee because of a **protected disclosure**.

EXAMPLE: A supervisor directs the geographic reassignment of an employee because the employee reported safety violations to senior agency officials.

■ **Personnel actions** that may constitute retaliation include (but are not limited to) reassignment, suspension, termination, adverse pay decisions, or a change in duties, responsibilities or working conditions, such as suspending an employee's ability to telework.

Whistleblower retaliation complaints



9/4/2019

Elements of a whistleblower retaliation complaint: An employee filing a whistleblower retaliation complaint must show that:

- 1) he or she engaged in an activity that he or she reasonably believed to be a protected disclosure;
- 2) the employer knew about the protected disclosure and the identity of the employee making the disclosure;
- 3) the employer took, failed to take (e.g., such as in the case of a promotion), threatened to take, or influenced an official to take a personnel action against the employee; and
- 4) the protected disclosure was a contributing factor in the personnel action.

If all these **elements** are met, the agency then would have to show by **clear and convincing evidence** that it would have taken the same action without the disclosure. **Clear and convincing evidence** factors include the:

- strength of the evidence in support of the personnel action;
- existence and strength of a motive to retaliate; and
- Treatment of similar employees who are not whistleblowers.

Knowledge Check

Directions: Match the letters in Column B with the descriptions in Column A. Answers in Column B may be used for more than one description in Column A or not at all.

Column A

1. A disclosure of wrongdoing which the employee reasonably believes evidences a violation of law, rule, or regulation; gross mismanagement; or abuse of authority.
2. A disclosure of wrongdoing which the employee reasonably believes evidences a substantial and specific danger to public health or safety.
3. An action filed with the Office of Special Counsel in response to an alleged Prohibited Personnel Practice.
4. Personnel action taken against a VA employee in response to contacting a member of Congress about patient safety.
5. An unlawful personnel action such as retaliation or discrimination that may be disclosed to the Office of Special Counsel (OSC).
6. Any personnel action against a VA employee because the employee filed a Whistleblower Disclosure with the Office of Special Counsel (OSC).
7. Core corporate values that guide the Federal Human Capital Management System.
8. Personnel action taken against a VA employee in response to filing a claim of gross mismanagement with the Office of Special Counsel (OSC).
9. Those things a Federal employee with personnel action authority MAY NOT DO.
10. Treating VA employees and applicants for employment fairly and equitably.

Column B

- A. Equal employment opportunity complaint
- B. Merit System Principles
- C. Prohibited Personnel Practices
- D. Office of Special Counsel Complaint
- E. Whistleblower Disclosure
- F. Whistleblower Retaliation

Knowledge Check - Answers

Directions: Match the letters in Column B with the descriptions in Column A. Answers in Column B may be used for more than one description in Column A or not at all.

Column A

Column B

- | | | |
|----------------|---|---|
| E | 1. A disclosure of wrongdoing which the employee reasonably believes evidences a violation of law, rule, or regulation; gross mismanagement; or abuse of authority. | A. Equal employment opportunity complaint |
| E | 2. A disclosure of wrongdoing which the employee reasonably believes evidences a substantial and specific danger to public health or safety. | B. Merit System Principles |
| D | 3. An action filed with the Office of Special Counsel in response to an alleged Prohibited Personnel Practice. | C. Prohibited Personnel Practices |
| F and C | 4. Personnel action taken against a VA employee in response to contacting a member of Congress about patient safety. | D. Office of Special Counsel Complaint |
| C | 5. An unlawful personnel action such as retaliation or discrimination that may be disclosed to the Office of Special Counsel (OSC). | E. Whistleblower Disclosure |
| F and C | 6. Any personnel action against a VA employee because the employee filed a <u>Whistleblower Disclosure</u> with the Office of Special Counsel (OSC). | F. Whistleblower Retaliation |
| B | 7. Core corporate values that guide the Federal Human Capital Management System. | |
| F and C | 8. Personnel action taken against a VA employee in response to filing a claim of gross mismanagement with the Office of Special Counsel (OSC). | |
| C | 9. Those things a Federal employee with personnel action authority <u>MAY NOT DO</u> . | |
| B | 10. Treating VA employees and applicants for employment fairly and equitably. | |



Agencies and groups that protect and enforce employee rights



Agencies that enforce employee rights




9/4/2019

<p>U.S. Office of Special Counsel (OSC)</p> 	<ul style="list-style-type: none"> • Independent agency enforcing whistleblower protections, safeguarding the merit system, and providing a secure channel for whistleblower disclosures. • OSC may accept whistleblower disclosures and require an agency to investigate the disclosures. • OSC may accept and investigate Prohibited Personnel Practices (PPP), especially whistleblower retaliation complaints. • OSC may recommend corrective action (e.g., placing an employee back in his or her position) for a whistleblower. • OSC may recommend disciplinary action against employees who commit PPP, including whistleblower retaliation. • If the agency refuses to comply with OSC's recommendation for corrective or disciplinary action, OSC may file a complaint with the Merit Systems Protection Board (MSPB). 	<p>Web: www.osc.gov</p> <p>Prohibited Personnel Practices: 800-872-9855</p> <p>Disclosures: 800-572-2249</p>
<p>U.S. Merit Systems Protection Board (MSPB)</p> 	<ul style="list-style-type: none"> • Independent agency protecting merit system principles and promoting an effective Federal workforce free of Prohibited Personnel Practices (PPP). • Hears and decides appeals of disciplinary and performance-based actions filed by employees appointed under title 5 of the United States Code, including employees in the Senior Executive Service. • May hear and decide appeals in certain other instances for employees appointed under title 38 of the United States Code. • Hears and decides actions filed by the U.S. Office of Special Counsel (OSC). • Can require an agency to take corrective action for a whistleblower or disciplinary action against an employee who has committed a PPP, including whistleblower retaliation. 	<p>Web: www.mspb.gov</p>

Agencies that protect and enforce employee rights



9/4/2019

<p>U.S. Equal Employment Opportunity Commission (EEOC)</p> 	<ul style="list-style-type: none"> • Independent agency responsible for enforcing Federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy and gender identity), national origin, age (40 or older), disability or genetic information. • Hears and decides discrimination complaints, including workplace hostility (hostile work environment) complaints due to one of the classes described above. • Hears and decides complaints on reasonable workplace accommodations. • Hears and decides complaints alleging retaliation for filing a discrimination complaint or participating in an employment discrimination investigation or lawsuit. • Can require an agency to take corrective action. 	<p>Web: www.eeoc.gov</p>
<p>VA Office of Resolution Management (ORM)</p>	<ul style="list-style-type: none"> • Promotes a discrimination-free work environment focused on serving Veterans by preventing, resolving, and processing workplace disputes in a timely and effective manner. • Investigates allegations of discrimination, workplace hostility (hostile work environment), and retaliation for filing discrimination complaints. • Investigates complaints on reasonable workplace accommodations. 	<p>Web: www.va.gov/ORM</p>
<p>VA Office of Employment Discrimination Complaint Adjudication (OEDCA)</p>	<ul style="list-style-type: none"> • Reviews the merits of employment discrimination claims filed by present and former VA employees and non-agency applicants for employment. • Issues final agency decisions and orders adjudicating employment discrimination complaints. • Final agency decisions issued by OEDCA may be appealed to the EEOC and if appropriate the Merit Systems Protection Board (MSPB). Individuals may also file a civil action in the appropriate United States District Court based on a final agency decision issued by OEDCA. 	<p>Web: www.oedca.va.gov</p>

Groups that protect employee rights



9/4/2019

VA Office of Inspector General (VAOIG)	<ul style="list-style-type: none">• Provides independent advice and objective reporting to the Secretary of Veterans Affairs and Congress.• Investigates criminal activity, waste, abuse, mismanagement, safety issues, and violations of law.• Employees must report actual or possible violations of criminal law to VAOIG.• VAOIG may recommend disciplinary action against employees to VA management or criminal action to the Department of Justice.• VAOIG also investigate substantial allegations of whistleblower retaliation against employees of VA contractors or grantees.• VAOIG Whistleblower Protection Ombudsman provides education about protections for current or former employees of VA, VA contractors, or VA grantees who make protected disclosures.	Web: www.va.gov/OIG VAOIG hotline: 800-488-8244 E-mail: vaoighotline@va.gov
Congress	<ul style="list-style-type: none">• Individuals (both employees and members of the public) may make a protected disclosure by raising allegations of wrongdoing, waste, abuse, mismanagement, safety issues, and violations of law to any member of Congress.• The member can then contact VA to follow-up on the information provided by the individual.• The member may also forward the information provided by the individual to another Federal agency for enforcement.• Congress may also independently investigate the protected disclosure.	U.S. House of Representatives: www.house.gov U.S. Senate: www.senate.gov

Groups that protect employee rights



9/4/2019

VA Office of Inspector General (VAOIG)	<ul style="list-style-type: none"> • Provides independent advice and objective reporting to the Secretary of Veterans Affairs and Congress. • Investigates criminal activity, waste, abuse, mismanagement, safety issues, and violations of law. • Employees must report actual or possible violations of criminal law to VAOIG. • VAOIG may recommend disciplinary action against employees to VA management or criminal action to the Department of Justice. • VAOIG also investigate substantial allegations of whistleblower retaliation against employees of VA contractors or grantees. • VAOIG Whistleblower Protection Ombudsman provides education about protections for current or former employees of VA, VA contractors, or VA grantees who make protected disclosures. 	<p>Web: www.va.gov/OIG</p> <p>VAOIG hotline: 800-488-8244</p> <p>E-mail: vaoighotline@va.gov</p>
Congress	<ul style="list-style-type: none"> • Individuals (both employees and members of the public) may make a protected disclosure by raising allegations of wrongdoing, waste, abuse, mismanagement, safety issues, and violations of law to any member of Congress. • The member can then contact VA to follow-up on the information provided by the individual. • The member may also forward the information provided by the individual to another Federal agency for enforcement. • Congress may also independently investigate the protected disclosure. 	<p>U.S. House of Representatives: www.house.gov</p> <p>U.S. Senate: www.senate.gov</p>

Groups that protect employee rights



9/4/2019



YOU

- VA employees have a duty to abide by and enforce the law.
- VA managers and supervisors are held to a higher standard.
- VA managers and supervisors must:
 - abide by and enforce all laws;
 - never commit Prohibited Personnel Practices (PPPs);
 - never retaliate against employees who blow the whistle;
 - take whistleblower disclosures seriously and, when appropriate, investigate;
 - promote an atmosphere that allows employees to safely report wrongdoings or violations of law, rule or regulation without the fear of retaliation;
 - proactively prevent violations of Merit System Principles and take action to prevent PPPs;
 - actively support VA's commitment to equal employment, diversity and inclusion, and whistleblower rights and protections; and
 - remember that all your actions or inactions reflect on VA.

Knowledge Check

Can revise if already
trained using these
examples

Directions: Match the letters in Column B with the descriptions in Column A. Answers in Column B may be used for more than one description in Column A or not at all.

Column A

1. Promotes a discrimination-free work environment focused on serving Veterans by preventing, resolving, and processing workplace disputes in a timely and effective manner.
2. Protects the Merit System Principles and promotes an effective Federal workforce free of Prohibited Personnel Practices.
3. Provides education about protections for current or former employees of VA, VA contractors, or VA grantees who make protected disclosures.
4. Provides independent advice and objective reporting to the Secretary of the VA and the Congress for the purpose of bringing about positive change in the integrity, efficiency, and effectiveness of VA operations.
5. Safeguards the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing.
6. Promotes an atmosphere that allows employees to safely report wrongdoings and provides a Federal workforce free of Prohibited Personnel Practices that adheres to the merit systems principles.

Column B

- A. VA Managers and supervisors
- B. Merit System Protection Board (MSPB)
- C. Office of Resolution Management (ORM)
- D. Office of Special Counsel (OSC)
- E. Office of the VA Inspector General (VAOIG)
- F. VA OIG Whistleblower Protection Ombudsman

Knowledge Check - Answers

Directions: Match the letters in Column B with the descriptions in Column A. Answers in Column B may be used for more than one description in Column A or not at all.

Column A

Column B

C

1. Promotes a discrimination-free work environment focused on serving Veterans by preventing, resolving, and processing workplace disputes in a timely and effective manner.

A. VA Managers and supervisors

**A, B,
and D,**

2. Protects the Merit System Principles and promotes an effective Federal workforce free of Prohibited Personnel Practices.

B. Merit System Protection Board (MSPB)

F

3. Provides education about protections for current or former employees of VA, VA contractors, or VA grantees who make protected disclosures.

C. Office of Resolution Management (ORM)

E

4. Provides independent advice and objective reporting to the Secretary of the VA and the Congress for the purpose of bringing about positive change in the integrity, efficiency, and effectiveness of VA operations.

D. Office of Special Counsel (OSC)

**A, B, D,
and E**

5. Safeguards the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing.

E. Office of the VA Inspector General (VAOIG)

A

6. Promotes an atmosphere that allows employees to safely report wrongdoings and provides a Federal workforce free of Prohibited Personnel Practices that adheres to the merit systems principles.

F. VA OIG Whistleblower Protection Ombudsman

Knowledge Check

1. Kylie, a Charge Nurse, makes a protected disclosure via the VA Office of the Inspector General (VAOIG) Hotline alleging that Intensive Care Unit (ICU) management has violated agency regulations by allowing nursing staff to adjust Veteran appointments without notifying the respective Veteran. Several weeks after making the disclosure, Kylie is reassigned to the Community-Based Outpatient Clinic (CBOC). Kylie believes the reassignment is in retaliation for filing the disclosure with the VAOIG. Kylie files a Whistleblower Retaliation Complaint with the Office of Special Counsel (OSC). Does Kylie have a viable OSC Whistleblower Retaliation complaint?
 - A. Yes
 - B. No
 - C. Maybe

2. Leslie, the Director of a Regional Office has a conversation with Jan. During the conversation, Jan recounts instances where the Regional Office Manager has taken improper adverse personnel actions against Regional Office staff. Jan particularly cites one instance where Candy, the Regional Manager improperly removed Mark from a list of employees selected for a career development detail. Jan hints about reporting Candy to the VA Office of the Inspector General (VAOIG) for abuse of authority. The next day, Candy calls Jan into her office and strongly suggests any ideas about calling VAOIG to report what happened to Mark would not be appropriate and would be met with swift action. Jan has grounds for:
 - A. Filing a whistleblower disclosure
 - B. Making a protected disclosure
 - C. Both, filing both a complaint and making a protected disclosure

Knowledge Check - Answers

1. Kylie, a Charge Nurse, makes a protected disclosure via the VA Office of the Inspector General (VAOIG) Hotline alleging that Intensive Care Unit (ICU) management has violated agency regulations by allowing nursing staff to adjust Veteran appointments without notifying the respective Veteran. Several weeks after making the disclosure, Kylie is reassigned to the Community-Based Outpatient Clinic (CBOC). Kylie believes the reassignment is in retaliation for filing the disclosure with the VAOIG. Kylie files a Whistleblower Retaliation Complaint with the Office of Special Counsel (OSC). Does Kylie have a viable OSC Whistleblower Retaliation complaint?

- A. Yes
- B. No
- C. Maybe*

Correct Answer. Kylie may have had a reasonable belief that ICU Management was violating agency regulations. The timeframe between the VAOIG complaint and personnel action also seems to suggest retaliation. Still, VA may be able to show that whistleblower retaliation did not occur if it can show that (1) it was not aware of Kylie's complaint to VAOIG; (2) it reassigned other employees in Kylie's group to the CBOC; and (3) it would have taken a similar action even if Kylie had not blown the whistle (e.g., Kylie may have had a particular skill set that management thought would be useful in a CBOC).

2. Leslie, the Director of a Regional Office has a conversation with Jan. During the conversation, Jan recounts instances where the Regional Office Manager has taken improper adverse personnel actions against Regional Office staff. Jan particularly cites one instance where Candy, the Regional Manager improperly removed Mark from a list of employees selected for a career development detail. Jan hints about reporting Candy to the VA Office of the Inspector General (VAOIG) for abuse of authority. The next day, Candy calls Jan into her office and strongly suggests any ideas about calling VAOIG to report what happened to Mark would not be appropriate and would be met with swift action. Jan has grounds for:

- A. Filing a complaint
- B. Making a protected disclosure
- C. Both, filing a complaint and making a protected disclosure*

Correct Answer. Jan can file a complaint alleging threatened adverse personnel action, a "Prohibited Personnel Practice." Additionally Jan can make a protected disclosure alleging abuse of authority.

Knowledge Check

3. As it relates to whistleblowers, VA managers and supervisors primary roles and responsibilities are all the following, except:
 - A. Stop whistleblower retaliation in all its forms.
 - B. Encourage VA employees and applicants for employment who believe they are the subject of whistleblower retaliation to seek redress through local processes before seeking redress through the Office of Special Counsel (OSC).
 - C. Ensure VA employees and applicants for employment are aware of their rights, remedies, and obligations under Whistleblower Laws.
 - D. Ensure VA employees and applicants for employment know how to file whistleblower disclosures.
 - E. Promote an environment where VA employees and applicants for employment feel safe reporting allegations of wrongdoing.
4. Martha supervises Judy and she discovers through office conversations that Judy is a lesbian. Martha changes Judy's schedule from the day-shift to the night-shift because she does not want to work with gay or lesbian individuals. Has Martha committed a prohibited personnel practice?
 - A. Yes
 - B. No
 - C. Maybe

Knowledge Check

3. As it relates to whistleblowers, VA managers and supervisors primary roles and responsibilities are all the following, except:
- A. Stop whistleblower retaliation in all its forms.
 - B. Encourage VA employees and applicants for employment who believe they are the subject of whistleblower retaliation to seek redress through local processes before seeking redress through the Office of Special Counsel (OSC).*
 - C. Ensure VA employees and applicants for employment are aware of their rights, remedies, and obligations under Whistleblower Laws.
 - D. Ensure VA employees and applicants for employment know how to file whistleblower disclosures.
 - E. Promote an environment where VA employees and applicants for employment feel safe reporting allegations of wrongdoing.

*Correct Answer.

4. Martha supervises Judy and she discovers through office conversations that Judy is a lesbian. Martha changes Judy's schedule from the day-shift to the night-shift because she does not want to work with gay or lesbian individuals. Has Martha committed a prohibited personnel practice?
- A. Yes*
 - B. No
 - C. Maybe

*Correct Answer. Martha has just discriminated against Judy based on her sexual orientation, which is something that does not affect her performance or the performance of others and may not be used as a basis for any action, including a personnel action involving a change in duties or working conditions.

Knowledge Check

5. Gary and his wife, Betty, work in the same office. Betty is one of the Branch Chiefs for the office, but she is not Gary's direct supervisor. Betty encourages Gary's supervisor, Al, to increase Gary's bonus this year. Has Betty committed a PPP?
- A. Yes
 - B. No
 - C. Maybe
6. Chris is looking to promote an editor in his office to a senior editor position. Jason is an editor who is currently supervised by Chris. Chris knows that Jason is a fantastic editor, and he believes that Jason would be great for the senior editor position. Chris announces the position, and Jason appears at the top of the list of eligible candidates. Chris interviews the eligible candidates. As Chris suspected, Jason is the best qualified candidate for the position. In addition, he performs best during the interviews. Consequently, Chris selects Jason for the position. Has Chris committed a PPP?
- A. Yes
 - B. No
 - C. Maybe

Knowledge Check

5. Gary and his wife, Betty, work in the same office. Betty is one of the Branch Chiefs for the office, but she is not Gary's direct supervisor. Betty encourages Gary's supervisor, Al, to increase Gary's bonus this year. Has Betty committed a PPP?
- A. Yes*
 - B. No
 - C. Maybe

*Correct answer. Betty has engaged in nepotism. Betty does not need to be Gary's direct supervisor to engage in nepotism. Betty advocated for an employment benefit for her husband.

6. Chris is looking to promote an editor in his office to a senior editor position. Jason is an editor who is currently supervised by Chris. Chris knows that Jason is a fantastic editor, and he believes that Jason would be great for the senior editor position. Chris announces the position, and Jason appears at the top of the list of eligible candidates. Chris interviews the eligible candidates. As Chris suspected, Jason is the best qualified candidate for the position. In addition, he performs best during the interviews. Consequently, Chris selects Jason for the position. Has Chris committed a PPP?
- A. Yes
 - B. No*
 - C. Maybe

*Correct answer. Chris has not committed a PPP. Chris held a fair competition and did not provide Jason an unauthorized preference. It is not prohibited to act upon a preconceived idea, based on knowledge of the individual's skills, that one person may be the best selectee for particular position.

Knowledge Check

7. Simon was a witness in George's Office of Special Counsel (OSC) complaint against George's supervisor, Pam. Pam finds out that Simon testified and decreases his bonus. Has Pam committed a PPP?
 - A. Yes
 - B. No

8. Martin discloses to VAOIG that his supervisor, Gloria, misused her government credit card by purchasing airline tickets to Hawaii for personal travel. It turns out that Gloria actually used her government credit card to purchase airline tickets to Hawaii for official agency travel. Has Martin made a protected disclosure?
 - A. Yes
 - B. No

9. Jessica discloses to a coworker that her supervisor, Andrea, falsified 30 minutes on her timecard. Andrea left work 30 minutes early, but her timecard reflected that she worked a full day. Has Jessica made a protected disclosure?
 - A. Yes
 - B. No, Jessica did not make a protected disclosure because she disclosed the violation to a coworker.
 - C. No, Jessica did not make a protected disclosure because 30 minutes is too small a time to matter.
 - D. Both B and C

Knowledge Check

7. Simon was a witness in George's Office of Special Counsel (OSC) complaint against George's supervisor, Pam. Pam finds out that Simon testified and decreases his bonus. Has Pam committed a PPP?

A. Yes*

B. No

*Correct Answer. Pam has committed a PPP. Simon engaged in protected activity by participating in George's OSC complaint.

8. Martin discloses to VAOIG that his supervisor, Gloria, misused her government credit card by purchasing airline tickets to Hawaii for personal travel. It turns out that Gloria actually used her government credit card to purchase airline tickets to Hawaii for official agency travel. Has Martin made a protected disclosure?

A. Yes*

B. No

*Correct Answer. Yes, if Martin had a reasonable belief that he made a protected disclosure. For example, if Martin viewed the government credit card bill and heard Gloria speaking about visiting family in Hawaii.

9. Jessica discloses to a coworker that her supervisor, Andrea, falsified 30 minutes on her timecard. Andrea left work 30 minutes early, but her timecard reflected that she worked a full day. Has Jessica made a protected disclosure?

A. Yes*

B. No, Jessica did not make a protected disclosure because she disclosed the violation to a coworker.

C. No, Jessica did not make a protected disclosure because 30 minutes is too small a time to matter.

D. Both B and C

*Correct Answer. Jessica has made a protected disclosure. There are no exceptions for minor or trivial matters when the disclosure involves a violation of law, rule, or regulation. In addition, a disclosure can be made to any person.

Knowledge Check

10. Luke asks his supervisor, Maxine, for six weeks of leave under the Family and Medical Leave Act (FMLA) due to complications related to the birth of his child. Maxine approves Luke's request for seven days of leave only. Luke goes over Maxine's head to the division director and explains to the division director that Maxine improperly denied the leave. The division director ultimately approves the full six weeks of leave requested by Luke. Maxine, however, issues a letter of reprimand to Luke, in part, because he went outside the chain of command to address the leave issue.

Did Maxine retaliate against Luke?

- A. Yes
- B. No

Maxine states that the other reason she issued the reprimand was to address the fact that Luke turned in a work assignment one-day late. Which of the following is true?

- A. Maxine did not retaliate against Luke because his work assignment was late.
- B. Maxine was justified in reprimanding Luke because his protected disclosure was only one of the reasons for the reprimand.
- C. None of the above.

Knowledge Check

10. Luke asks his supervisor, Maxine, for six weeks of leave under the Family and Medical Leave Act (FMLA) due to complications related to the birth of his child. Maxine approves Luke's request for seven days of leave only. Luke goes over Maxine's head to the division director and explains to the division director that Maxine improperly denied the leave. The division director ultimately approves the full six weeks of leave requested by Luke. Maxine, however, issues a letter of reprimand to Luke, in part, because he went outside the chain of command to address the leave issue.

Did Maxine retaliate against Luke?

- A. Yes*
- B. No

*Correct Answer. Maxine retaliated against Luke. There is no requirement to follow the chain of command when making a disclosure. Additionally, the disclosure does not lose its protection because the agency later corrected the underlying error.

Maxine states that the other reason she issued the reprimand was to address the fact that Luke turned in a work assignment one-day late. Which of the following is true?

- A. Maxine did not retaliate against Luke because his work assignment was late.
- B. Maxine was justified in reprimanding Luke because his protected disclosure was only one of the reasons for the reprimand.
- C. None of the above.*

*Correct Answer. Maxine may have engaged in retaliation if the disclosure factored at all into the personnel action decision, even if it is one of several reasons for the personnel action.

Questions???

Whistleblower Rights and Protection & Prohibited Personnel Practices

TAKE AWAY POINTS:

- 1.
- 2.
- 3.

